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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1688

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Appellant,

versus

CHARLES R. BRADY, CHAIRMAN, STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of the State of Mississippi

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi (Appendix "A") is reported at 342 So. 2d 295 (1977). The opinion of the Chancery Court of the First Judicial District of Hinds County, Mississippi (Appendix "B") is not reported.

JURISDICTION

This action was commenced in the Chancery Court of the First Judicial District of Hinds County, Mississippi, pursuant to Section 9220-31, Mississippi Code of 1942 (now codified as Section 27-7-73, Mississippi Code of 1972, Annotated, Vol. 7, page 407) seeking a hearing on the merits as to the assessment of additional income tax and interest for calendar years 1969, 1970 and 1971 against John Hancock Mutual Life Insurance Company (referred to hereinafter as "John Hancock") by order of the Mississippi State Tax Commission. The decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi vacating, setting aside and holding for naught the order of the State Tax Commission was entered on April 4, 1975 (Appendix "C"). Upon timely appeal by Charles R. Brady, Chairman, State Tax Commission and cross-appeal on constitutional issues by John Hancock, the final decree of the Chancery Court was reversed and the order of the State Tax Commission was reinstated. The judgment of the Mississippi Supreme Court reversing the decree of the Chancery Court and reinstating the order of the State Tax Commission was entered on January 12, 1977 (Appendix "D"). Timely Petition for Rehearing filed by John Hancock was denied on March 2, 1977 (Appendix "E"). Notice of Appeal to the Supreme Court of the United States was filed in the Mississippi Supreme Court on May 6, 1977 (Appendix "F"). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

QUESTION PRESENTED

Section 9220-12(1)(a), Mississippi Code of 1942 (now codified as Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated, Vol. 7, page 381) specifies that as to nonresident or foreign taxpayers various items of gross income shall be treated as income from sources within the state, specifically including income from intangible property if the evidence of ownership has acquired a business, commercial or actual situs within the state. Where that gross income is derived from sources partly within and partly without the state (referred to hereafter as "Unitary Income"), Section 9220-12(1)(c), Mississippi Code of 1942 (now Section 27-7-23(1)(c), Mississippi Code of 1972, Annotated, Vol. 7, page 382) in general terms, provides for the determination of Unitary Net Income and for the use of general apportionment formulas prescribed by the Commissioner of the State Tax Commission, with the approval of the Governor; however, no apportionment formula has been prescribed for mortgage lending activities. The Mississippi Supreme Court has construed the statute to permit taxation of interest income received by a nonresident or foreign life insurance company on loans evidenced by promissory notes (*i.e.*, the "evidence of ownership") held out of state but secured by Mississippi real estate. No apportionment formula was utilized in said taxation. The supreme court's decision was predicated, in part, on its finding that the "evidence of ownership" referred to in the statute meant the deed of trust, or mortgage, recorded in the county of the security and possibly, in part, on its finding that the mortgage lending activity of a life insurance company supports its insurance business, which when conducted in the state gives the state

another contact with the mortgage lending activity which is conducted out of state. Those findings supported the supreme court's conclusion that the "evidence of ownership" had acquired an actual situs in the State and that, therefore, taxation of the interest income was not an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The following question is presented by this appeal: Whether the State of Mississippi under the Due Process Clause of the Constitution of the United States may impose its net income tax on Appellant as to Appellant's interest income from loans secured by real property in the state under Section 9220-12(1)(a), Mississippi Code of 1942 (now codified as Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal is predicated upon the Due Process Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides in part that no state shall ". . . deprive any person of life, liberty, or property, without due process of law . . ."

The following statutes were in effect at all times relevant to this litigation:

Section 9220-12(1)(a) and (c), Mississippi Code of 1942 (now codified as Section 27-7-23(1)(a) and (c), Mississippi Code of 1972, Annotated, Vol. 7, page 381), which reads as follows:

(1) In the case of foreign corporations or of individuals, partnerships, trusts or estates, not residents of the State of Mississippi, the following items of gross income shall be treated as income from sources within the state:

(a) Income from intangible property of any kind or nature, if the evidence of ownership has acquired a business, commercial, or actual situs in this state; compensation for personal services or labor performed within this state; rentals or royalties from property or any interest in property within the state, or property moved within and without the state, to the extent that such rentals or royalties represent payment for use within the state; insurance premiums received under contracts covering Mississippi risks and reinsurance premiums received on reinsurance assumed from domestic companies covering Mississippi risks; and income from the operation, or ownership of any property within the state. There shall be reported any and all income from activities or transactions engaged in within this state for the purpose of financial profit or gain, whether or not the taxpayer is qualified to do business in this state, maintains an office or place of business, or the activity or transaction is in, or connected with, interstate or foreign commerce.

• • •

(c) In the cases of gross income derived from sources partly within and partly without

the state, the net income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the state may be determined by processes or formulas of general apportionment, prescribed by the commissioner, with the approval of the governor.

Massachusetts Annotated Laws, Chapter 175, Section 64 which reads as follows:

> No investment, sale or loan, except loans on its own policies, shall be made which has not first been authorized by the Board of Directors, or by a committee thereof charged with the duty of investing or loaning the funds of the company . . .

The following Massachusetts statute was in effect with respect to taxable years ending on or after December 31, 1971:

Massachusetts Annotated Laws, Chapter 63, Section 22A (as added by Chapter 555, Acts 1971, effective July 22, 1971 and applicable to taxable years ending on or after December 31, 1971) which reads as follows:

> Every domestic insurance company coming within the scope of the definition of a domestic

company in section one of chapter one hundred and seventy-five shall annually pay, as part of its excise imposed under this chapter, an amount equal to one percent of its total gross investment income earned during the preceding calendar year, as reported in its annual statement for said year filed with the commissioner of insurance and as shown in Exhibit 3 of said statement for a life insurance company or in Item 10, Column 8, Part I, of the Underwriting and Investment Exhibit for any other domestic company.

STATEMENT OF THE CASE

This case involves the assessment by the Mississippi State Tax Commission of the state's income tax and interest thereon against Appellant, John Hancock Mutual Life Insurance Company (hereinafter referred to as John Hancock), a Massachusetts corporation with its principal place of business and home office in Boston, Massachusetts. For all times material herein, John Hancock was qualified with the Mississippi Insurance Commission to engage in the life insurance, health and accident insurance, and variable annuity business within Mississippi and did engage in those businesses through its Insurance Sales Department (R. 4-5; 52; 521-522; 527; 530). For the years 1969, 1970 and 1971, John Hancock paid premium taxes of $276,360 to the Mississippi Insurance Commission on premiums received with respect to its Mississippi insurance sales.

John Hancock was not qualified, however, with any other agency, board or administrative body of the state or any local government to engage in any other business activities within Mississippi (R. 4-5; 52). Through its Investment Department in Boston, using personnel separate and apart from those in its Insurance Sales Department, John Hancock made various investments (R. 223, 226; 232-233; 279; 281; 283; 292-293; 387-389; 420; 454-456; 475; 517-518). Among the investments made were mortgage loans* secured by real property located in various states, including Mississippi (R. 290; 517-527).

For tax years ending on or after December 31, 1971, Massachusetts imposed a gross investment income tax on John Hancock's total gross investment income (which included interest earned on mortgage loans on Mississippi real property) in addition to all other taxes which may have been imposed upon John Hancock by Massachusetts or other jurisdictions. See, Mass. Ann. Laws, Ch. 63, § 22A (as added by Chapter 555, Acts 1971, effective July 22, 1971 and applicable to taxable years ending on or after December 31, 1971).

During the years in question, John Hancock made two types of mortgage loans with respect to Mississippi real property: (1) farm mortgage loans and (2) city mortgage loans consisting of (a) loans on residential real property and (b) loans on commercial real property (R. 398; 413-414; 475-476). Farm mortgage loans were made through John Hancock's Regional Office in

* For convenience of expression the term "mortgage loan" is used in this Jurisdictional Statement, although the instrument generally used in Mississippi to place a contractual lien on real property is called a "deed of trust."

Memphis, Tennessee (R. 395-396), while its other mortgage loans were made either directly from its Boston home office or by or through correspondents or mortgage brokers in Mississippi, acting as independent contractors (R. 477; 495-496).

For each of the years 1969, 1970 and 1971 the State Tax Commission, acting under Section 9220-12(1)(a), Mississippi Code of 1942 (now codified as Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated) set out hereinabove, assessed net income tax against John Hancock based, in part, on all the interest income received in those years by John Hancock from mortgage loans evidenced by promissory notes and secured by Mississippi real property. The assessment was predicated on the State Tax Commission's position that the interest income received by John Hancock was from a Mississippi source, *i.e.* intangible property, "the evidence of ownership of which has acquired a business, commercial, or actual situs" in Mississippi. The assessment of income tax and interest to the date of the assessment was in the total amount of $228,481.19 for the years 1969, 1970 and 1971.

Upon the trial of the case, the following undisputed facts were established concerning John Hancock's mortgage lending activities with respect to Mississippi real property:

John Hancock's farm lending activities as to Arkansas, Mississippi and Louisiana were conducted from its regional office in Memphis, Tennessee, through an Agricultural Investment Officer (R. 402-404). A field man who worked under that Memphis officer in

Arkansas, Mississippi and Louisiana, had his office in the Memphis regional office. Although he lived in Cleveland, Mississippi, he spent approximately one and one-half days each week in his Memphis office and the rest of the week traveling in the three states (R. 403; 427-428; 434; 444). Farm loans were initiated by applications directly from the prospective borrower or through a broker, an independent contractor who received a fee paid by the loan applicant and not by John Hancock (R. 398-399; 430; 448). Furthermore, the brokers initiated loans for a number of lenders in addition to John Hancock (R. 398-399).

Whether a loan application was from Louisiana, Mississippi or Arkansas or as to land in two or more of these states, once it was received, the field man contacted the prospective borrower or broker, wherever he was, to obtain a correct land description, to ascertain the prospective borrower's financial condition and to make an inspection and appraisal of the proposed security (R. 399-401; 430-432). Thereafter, the field man submitted a report to the Memphis regional office either recommending the loan or advising against it (R. 401-402). In his contact with the prospective borrower or broker, the field man had no authority to commit John Hancock to make a loan or to enter into any binding agreement (R. 401; 447).

All data with respect to the loan application, including the recommendations of the field man and of the Agricultural Investment Officer, were forwarded to John Hancock's Boston home office for analysis and review. A staff in the Boston office analyzed each prospective loan, after which followed further review

by a Departmental Committee composed of loan production personnel. Thereafter, the Real Estate Committee, partly composed of outside real estate personnel and partly of officers and directors of the company, reviewed the material for presentation with recommendations to the Finance Committee. Only the Finance Committee located in Boston had authority to commit John Hancock to make a loan (R. 405-408; 477-478; 531-532). If a loan application was approved, the Memphis office was so advised by telegram (R. 406). The Agricultural Investment Officer in Memphis prepared a letter of commitment which was sent directly to the prospective borrower (R. 406-408).

Loans were closed by a title insurance company, an independent contractor, with offices in Mississippi pursuant to instructions received from the Memphis office of John Hancock (R. 408-410; 435). All loan funds were drawn from bank accounts in Boston (R. 410-411). John Hancock maintained no "list" of approved loan-closing attorneys, and since the borrower paid all attorneys fees, he could employ the attorney (also, an independent contractor) of his choice, as long as such attorney was acceptable to the title insurance company (R. 409-410).

Once a loan was closed, the mortgage (or deed of trust generally used in Mississippi) was placed of record in the Mississippi county in which the security was located (R. 412; 423-424; 438). The Agricultural Investment Officer, a resident of Memphis, was designated as trustee in the deeds of trust (R. 414-415; 442).

Following closing of the loan, all of the papers and documents pertinent to the loan were gathered into a "package" consisting of (1) the loan application, (2) the appraisal report, (3) a copy of the commitment letter, (4) the promissory note, (5) the deed of trust, (6) the loan-closing statement, and (7) the title insurance policy and other related documents and were transmitted to John Hancock's Boston home office for keeping during the duration of the loan (R. 412-418). Servicing of the loans, *i.e.*, collecting payments, making certain that the borrower kept property taxes and insurance on the security current, seeking payment of delinquent loan installments, etc., was handled by and through the Boston and Memphis offices of John Hancock (R. 419-420; 423-424; 428).

If it became necessary to foreclose under the terms of a deed of trust for non-payment of a loan, a Mississippi attorney was selected by John Hancock to serve as substituted trustee under the deed of trust (R. 424). The Memphis, Tennessee Agricultural Investment Officer testified that during his employment with John Hancock (since 1951) there had been only "about four" foreclosures of farm loans by John Hancock in Mississippi (R. 423-424). During the years in question John Hancock had on its books an estimated three hundred farm loans in Mississippi (R. 428-429).

John Hancock's city, *i.e.* residential and commercial, mortgage loans were acquired through a Mississippi correspondent, an independent contractor, whose duties to John Hancock and other lenders not affiliated with John Hancock included the production and recommendation of loans and the subsequent servicing of such loans acquired by the lender (R. 477; 495-496). Since 1948 John Hancock had maintained a non-exclusive correspondent's agreement with either W. P. Bridges or his successor corporation, Bridges Loan and Investment Company, Inc. of Jackson, Mississippi (hereinafter referred to as Bridges) (R. 479-481). As an independent contractor, Bridges was in the business of originating mortgage loans with its own or banks' money and selling them to various investors such as John Hancock (R. 548-549; 558-559). Thus, where loans were purchased by John Hancock from Bridges, it was Bridges and not John Hancock which closed them and had the deed of trust and assignment recorded.

Under the terms of the non-exclusive agreement between Bridges and John Hancock, Bridges was an independent contractor and, as such, was not prohibited from dealing with other investors (R. 488-490; 532-534; 548-549; 560). In fact, Bridges maintained agreements with approximately 26 other investors or lenders such as banks, other insurance companies, pension funds, etc. (R. 548; 559). Bridges was compensated, in part, through loan origination fees paid by the borrowers. In addition, in its dealings with John Hancock and other investors, Bridges was compensated by a percentage of annual interest collected, which was a fee for servicing but not for originating loans (R. 488; 549; 553-554; 560). Bridges serviced the loans originated by it for the various investors by collecting the installment payments, making certain that property taxes were paid and insurance was maintained on the property by the borrowers, and seeking payment of delinquent loan installments (R. 488; 548-549; 552).

Though John Hancock had acquired residential mortgage loans in prior years, during the years in question, it acquired no additional residential loans (R. 477). Practically all of its Mississippi residential loans had been made by Bridges and subsequently sold or assigned to John Hancock. Under that procedure, Bridges closed the loans in its own name utilizing its own funds (or funds borrowed from a local bank) or closed the loans in the name of a bank utilizing the bank's funds. John Hancock did not make any residential loans directly to the borrower (R. 496).

Commercial loans generally were acquired under three (3) procedures. One procedure was for the independent correspondent to send for review to John Hancock, which had no mortgage lending offices in Mississippi, a loan application of a prospective borrower who had approached the correspondent or who had been contacted by the correspondent (R. 477). If the loan was approved, the closing papers were prepared by John Hancock's Law Department in Boston and transmitted to the borrower's local attorney or title company with closing instructions (R. 478). In some instances, a local attorney who was selected and was compensated by the seller or purchaser of real estate, prepared all the loan closing documents (R. 549-550).

Some commercial loans were acquired by John Hancock in a manner similar to that employed with respect to residential loans where the correspondent closed the loan with its own funds or funds obtained from a local bank.

On occasion John Hancock acquired "three-party" commercial loans where the loan was closed by a bank on forms approved by John Hancock, and John Hancock subsequently purchased the closed loans. In these instances generally with respect to construction loans, John Hancock had an agreement with the bank and with the loan applicant. The bank would finance the construction costs, and when the project reached completion or otherwise met the terms of John Hancock's loan commitment, the loan was purchased by John Hancock (R. 493). In that situation, the correspondent did not have its own money involved (R. 551).

In all instances, mortgage loans acquired or made directly to the borrower by John Hancock were screened and approved in its Boston home office in a manner similar to that employed with respect to farm loans (R. 477). Once approved, however, the basic closing procedure called for the independent correspondent to prepare or have prepared the loan closing documents for approval of the Law Department of John Hancock in Boston. Any comments of John Hancock generally were directed to the independent title insurance company or to the local Mississippi attorney employed by the borrower (R. 549-550; 560-561). Once or twice loans were made directly from the Boston home office, in which case the loan closing papers were prepared by the Law Department and sent to a local attorney or title insurance company, selected by the borrower, with loan closing instructions (R. 478).

At no time did John Hancock maintain a bank account in Mississippi from which funds could be drawn

to make mortgage loans. All such funds came from bank accounts in Boston (R. 410-411; 491-493). As was the case with respect to farm mortgage loans, following the closing of all city mortgage loans by John Hancock, or where such loans subsequently were acquired by John Hancock, a "package" consisting of the title insurance, survey, closing statement, note, recorded deed of trust and other related papers, was forwarded immediately and directly or through the correspondent to John Hancock's Boston home office where they were kept throughout the life of the loan (R. 490-496; 509-510; 550-552).

Until around 1969 or 1970, when its servicing arrangement with John Hancock was terminated, Bridges serviced John Hancock's city mortgage loans on Mississippi property (R. 488; 490; 552-553). Personnel of Bridges collected loan payments and escrow funds and remitted principal and interest payments less servicing fees to John Hancock on an every other day basis during the early part of each month and then at decreasing intervals later in the month. A portion of the funds, *i.e.*, the escrow funds, were retained by Bridges in a trust account to pay real estate taxes and insurance. In addition, a portion of the funds were withheld by Bridges as its servicing fee; however, Bridges did not hold and invest any of John Hancock's money for John Hancock (R. 552). Following the termination of its servicing arrangement with Bridges, John Hancock serviced its city mortgage loans out of its offices in Statesboro, Georgia, or Memphis, Tennessee.

Practically the identical methods utilized by John Hancock in investing its funds secured in whole or in

part by Mississippi real property were utilized by other foreign insurance companies and investors (R. 559).

The foregoing statement of the undisputed facts proven in the trial of this case conclusively demonstrates that only a very minor and insignificant part of its total mortgage lending activities was conducted by John Hancock in Mississippi and was protected by Mississippi law.

The original pleadings filed by John Hancock in this cause alleged, *inter alia*, that the assessment of income taxes against the interest income received by John Hancock from loans secured in whole or in part by real property located in Mississippi was unconstitutional because John Hancock's activity with respect to such loans was conducted in interstate commerce and the State of Mississippi did not have, with such income of John Hancock or the intangible properties or activities of John Hancock from which such income was produced, the nexus or contact (1) required by the due process and/or equal-protection-of-the-laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States to give Mississippi jurisdiction to assess its income tax, or (2) required by the interstate commerce provisions of Article I, Section VIII (through inadvertence Section VII was cited in the Petition rather than Section VIII), Clause 3 of the Constitution of the United States, to prevent the assessment from being an unconstitutional burden on interstate commerce.

John Hancock further alleged that since the State of Mississippi by statute, regulation or administrative

policy does not permit an apportionment of a foreign life insurance company's multi-state income from its mortgage lending activity, especially in view of the fact that a single loan may be secured by real estate not only in Mississippi but also one or more other states, the nexus or connection with the State of Mississippi must be clearer and exist to a greater extent, and be established by more positive factual evidence than would otherwise be proper if such income were subject to an apportionment formula (R. 15, Paragraph VIII(f), Petition).

The trial court found in favor of John Hancock on other grounds and therefore found that ". . . it is not necessary to entertain and render an opinion on the points submitted for consideration by Hancock relative to the constitutionality of the assessment of the tax here in question." (Appendix "B")

The State Tax Commission appealed to the Mississippi Supreme Court, the highest Court of the State in which a decision could be had as well as the state court of last resort, from the decree of the trial court in favor of John Hancock. A cross-appeal from the decree of the trial court was taken by John Hancock to the Mississippi Supreme Court assigning as error the failure of the trial court to entertain and give consideration to John Hancock's contentions that the assessment of income tax was unconstitutional for the reasons cited in its Petition to the trial court.

In reversing the decree of the trial court and reinstating the order of the State Tax Commission, the Mississippi Supreme Court held that the cross-appeal of John Hancock was without merit in view of the holding in *Curry v. McCanless*, 307 U.S. 357 (1939), and its holding in *Akers v. Estate of Johnson*, 236 So. 2d 437 (Miss. 1970) (Appendix "A"). Thus, the constitutional issues presented by this appeal were raised in the pleadings filed in the trial court and were raised again on cross-appeal to the Mississippi Supreme Court, where the constitutional contention was decided on its merits.

THE QUESTION IS SUBSTANTIAL

The issue presented to the Mississippi Supreme Court was the constitutionality of the Mississippi income tax statute, Section 9220-12(1)(a), Mississippi Code of 1942 (now codified as Section 27-7-23(1)(a), Mississippi Code of 1972 Annotated), which treats a nonresident's income from intangible property as income from sources within the state if the evidence of ownership of the intangible has acquired a business, commercial, or actual situs within the state. The Mississippi Supreme Court held that taxing, under that statute, a nonresident on the interest income received from loans evidenced by promissory notes held outside Mississippi and secured by real estate located within Mississippi did not violate the Fourteenth Amendment Due Process Clause, citing *Curry v. McCanless*, 307 U.S. 357 (1939).

The constitutional question involved two questions: (1) whether the State of Mississippi constitutionally had sufficient contact with Appellant's income from loans secured by Mississippi realty to make Mississippi a source of that income and to give it the jurisdiction or power to tax at least a portion of the income; (2) if so, and if that interest income had sources both within and without Mississippi, was the State con-

stitutionally prohibited from exercising that power through a statute which treated that income as having its only source in Mississippi. *Curry v. McCanless* decided that more than one state may have the power or jurisdiction to assess its decedent's transfer taxes against the same estate as to the same intangible property but it did not deal with the question of how that power must be exercised by each state. Specifically, it did not deal with the question, whether, where the activity, property or income in question has sources in two or more states, each state, if it wishes to exercise its power, is limited to taxation of only that portion which has its source in the state; and, if so, whether that portion must be determined by an apportionment formula which approximately utilizes for that state only the local contacts it has with the activity, property or income in question. These questions have been decided in the affirmative by this Court, however, in later cases, *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948); *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959).

In not finding the taxation of the city loans (residential and commercial) violative of the Fourteenth Amendment Due Process Clause, the Mississippi Supreme Court completely ignored one of this Court's leading decisions on the constitutionality of the imposition of a state income tax on a nonresident's income, *Shaffer v. Carter*, 252 U.S. 37 (1920), which opinion held that a state could tax a nonresident on the income derived from property located within or business conducted within the state. In the instant case, John Hancock's interest income found its source in the debt obligation held in Massachusetts, and not from the Mississippi real property serving as security for the debt. Furthermore, the Mississippi Supreme Court

failed to determine the prerequisites for finding that the Appellant conducted its money lending and investing activities within Mississippi. The trial court held that John Hancock was not conducting its mortgage lending business in Mississippi and the Mississippi Supreme Court did not question that finding of fact.

The Mississippi Supreme Court failed to consider *Connecticut General Life Insurance Company v. Johnson*, 303 U.S. 77 (1938), in which an income tax on reinsurance premiums paid pursuant to insurance contracts negotiated and executed outside the taxing state was found to violate the Fourteenth Amendment Due Process Clause. Interpreting the income tax as a tax upon a nonresident for a business conducted outside the taxing jurisdiction, the Court concluded that a taxing state could not tax economic benefits resulting from intrastate transactions in which a nonresident did not participate but through which a nonresident enjoys benefits outside the taxing state. A state's jurisdiction to tax is limited by the incidents (objects) taxed, not by the ultimate economic benefits derived. 303 U.S. at 80-81. Though Mississippi may have been the site of the initial loan transaction between the borrower and the correspondent, title insurance company or closing attorney, all of whom or which were independent contractors who were brought into the transaction by the borrower, the nonresident Appellant's first contact with the city mortgage loans occurred outside the taxing state, Mississippi, when the correspondent negotiated the sale of a group of loans to the nonresident. This latter transaction constituted no more than the sale or assignment of commercial paper in interstate commerce. The interest on the loans (the economic benefit) was paid to,

received and enjoyed by the nonresident Appellant outside of the taxing state.

Nor does the Mississippi Supreme Court's opinion make any reference to *Wisconsin v. J. C. Penney Company*, 311 U.S. 435 (1940), in which this Court found not to be violative of due process a supplementary income tax on the privilege of declaring outside of the state, dividends for income derived from property located and business transacted (*i.e.*, selling) in the taxing state. The *Wisconsin v. J. C. Penney Company* test under the Fourteenth Amendment's Due Process Clause, is whether the state's taxing power bears fiscal relation to protection, opportunities and benefits given by the taxing state. This Court found the protection, opportunities and benefits implicit in the privilege of carrying on a business within the state. Clearly, Mississippi has given the Appellant nonresident lender no protection, opportunities, or benefits as to its city mortgage loans, since Appellant's city (residential and commercial) mortgage lending activities were conducted by purchasing and taking possession of the papers representing those loans outside Mississippi after they were closed. Thus, the tax as to the city loans cannot be related to a Mississippi incident since, as construed by *Connecticut General Life Insurance Company v. Johnson*, the nonresident Appellant's contacts and enjoyment occurred outside Mississippi.

Likewise, in upholding the constitutionality of the taxation of the farm loans, the Mississippi Supreme Court failed to refer to *Shaffer v. Carter*, 252 U.S. 37 (1920), holding state taxation of a nonresident on the income which was accrued from property or business

within the state constitutional. As with the city mortgage loans, the Appellant's interest income is derived from the debt obligation which is held outside of Mississippi, not from the Mississippi real property serving as security for such loans. Again, the Mississippi court's opinion lacks a foundation upon those elements essential to a finding that a lending business was conducted within or a business situs was established within the taxing state. In *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937), the constitutionality of a tax on the profits made by a nonresident on the sale of intangible property within the taxing state was determined. It established that business situs necessary to support jurisdiction to tax intangibles will be found where the rights connected with the intangibles are localized within the taxing state, and that such localization occurs either because the intangible rights grow out of the transaction of a localized business or because the exercise of those intangible rights is fixed at a particular place. The nonresident Appellant in the instant case, John Hancock, did not maintain any offices within the taxing state for the purpose of investing in mortgage loans, did not solicit mortgage loans in the taxing state, and did not place any money in Mississippi to be loaned or leave in Mississippi for reinvestment the monies derived from repayments of such loans previously made.

It respectfully is submitted that the Appellant did not have a localized mortgage lending business within Mississippi; that the legal protection Mississippi gave to Appellant's insurance business in Mississippi cannot be made the basis for power to tax Appellant's income from Mississippi mortgages, in view of the fact that Appellant paid to Mississippi an-

nually a substantial premium tax with regard to its Mississippi insurance business, even though on a nation-wide basis Appellant's income from its investment business did enable it to meet its insurance and annuity obligations whenever and wherever its premium income was insufficient for that purpose; that the legal protection given by Mississippi to Appellant as to its loans secured by mortgages on Mississippi realty, through land, title recording, foreclosure, default judgment lien and other laws cannot be made the basis for such power to tax, in view of the substantial property taxes which were paid to the state and its political subdivisions as to the realty covered by the mortgages; and therefore that no business situs existed in Mississippi as to Appellant's loans on Mississippi realty, and Mississippi had no constitutional right, power or jurisdiction to tax the interest income generated by the debt obligations.

Before examining the constitutional power to tax question discussed above, however, this Court first may want to consider the Mississippi Supreme Court's interpretation of Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated, that the Mississippi Legislature in its 1952 and 1958 amendments to that code section intended that the "evidence of ownership" of a mortgage loan is the mortgage or deed of trust and that the mortgage or deed of trust is deemed to have business situs in Mississippi, if it is recorded in Mississippi, even though it is physically possessed out of state. Before the Mississippi court's John Hancock decision, it has for a long time been thought that the sole evidence of ownership of the mortgage loan was the promissory note. *Buckley v. Daley*, 45 Miss. 338 (1871) Appendix "A" at A13. If this Court

should disagree with that decision of the Mississippi court, that alone might be sufficient for reversal. *General Motors Corporation v. District of Columbia*, 380 U.S. 553 (1965).

If, however, this Court should decide that under the circumstances Mississippi did have the constitutional power or jurisdiction under the Fourteenth Amendment's Due Process Clause to levy its income tax as to Appellant's interest income from mortgage loans, there still remains the most important question, whether the taxing statute used, Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated, is unconstitutional under the Due Process clause, as applied in this case, because it levies the state's net income tax without fairly apportioning Appellant's net interest income from its mortgage lending activities to the sources of that income in Mississippi and outside Mississippi. The levy was not made under Section 27-7-23(1)(c), Mississippi Code of 1972, Annotated, the statute which pertains to situations where gross income is derived from sources partly within and partly without the state. Furthermore the Mississippi State Tax Commissioner has never prescribed under the latter statute any process or formula of general apportionment, whereby the portion of such multi-source taxable income of a mortgage lending business attributable to sources within Mississippi may be determined.

Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated, when applied to multi-state mortgage lenders such as Appellant, (which conducts not only its lending business but also its lending activities with regard to Mississippi real property in many states) violates the Due Process Clause of the

Fourteenth Amendment to the Constitution of the United States, because (1) it limits the determination of the source of income from intangible property such as mortgage loans to a single factor, *i.e.*, the business, commercial or actual situs of the evidence of ownership of the intangible, (2) it fails to recognize that a multi-state mortgage lender's interest income from loans made on property in one state is a part of the unitary interest income of the lender from its lending activities in all states and (3) it fails to provide a multi-factor apportionment formula for allocation of the unitary net interest income which fairly recognizes the multi-state lender's mortgage lending activities in or with reference not only to Mississippi but also to all the states in which the lender conducts this business, thus avoiding double or multiple net income taxation by two or more states.

Many states have some contact with Appellant's income from mortgage loans and each can be deemed to be a source among many sources of the Appellant's mortgage income. Each state, including Mississippi, has the power to tax only that portion of Appellant's income which is fairly related to Appellant's mortgage lending activity in or with reference to it.

Following is a list of some but not necessarily all of the states which may be deemed to have sufficient contact with a multi-state lender such as Appellant so that each may be deemed to be a partial source of and to have the power and right, if it wishes to do so, to tax that portion of the lender's unitary net income from lending, fairly related to that state's contact with the lender's business:

(1) State of incorporation or legal domicile of the lender;

(2) State in which the lender's principal office or commercial domicile is located;

(3) Each state in which each segment of the total mortgage lending activity is conducted by Appellant and its officers, employees and agents (but not by independent contractors);

(4) Place where the evidence of ownership of a loan physically is located;

(5) Place where a loan is used in some way as an asset in Appellant's business;

(6) State in which the money loaned is kept prior to the loan;

(7) Place where the tangible property (whether realty or personalty) or evidence of ownership of intangible property (such as stock or bonds or notes), serving as loan security, is located or kept;

(8) The place where the security paper is recorded or can be recorded.

The above list demonstrates that a single factor such as the business or commercial situs of the evidences of ownership of intangibles does not result in a fair apportionment of Appellant's income to Mississippi sources and can result in multiple taxation of Appellant's entire unitary, net interest income (as it has occurred in this case, since Massachusetts, Appellant's legal and commercial domicile, levies a

gross income tax on Appellant's entire interest income from everywhere, including this Mississippi interest income. Each has assessed *all* of the Mississippi interest income).

This Court decided in *Underwood Typewriter Company v. Chamberlain*, 254 U.S. 113 (1920) and *Han Rees' Sons v. North Carolina*, 283 U.S. 123 (1931) that a tax on the net profits of an unitary enterprise must be apportioned among the different jurisdictions with respect to the processes by which profits are earned. Another subsection of the Mississippi statute provided for an apportionment formula, but one was not utilized. The interest income from Mississippi farm and agribusiness loans was due largely to Appellant's business processes centered in Tennessee, where the Agricultural Investment Officer was located, and in Massachusetts where the home office of the Appellant was located and final approval for all loans was given. Its interest income from its city loans was largely due to its business processes in Massachusetts. Therefore, the taxing statute, Section 27-7-23(1)(a), Mississippi Code of 1972, Annotated, is unconstitutional under the Fourteenth Amendment Due Process Clause when applied to Appellant's mortgage lending business, because it does not fairly apportion Appellant's income therefrom to Mississippi sources. *National Liberty Life Insurance Co. v. Wisconsin*, 215 N.W. 2d 26 (Wis., 1974).

This case is very important not only to Appellant but also to all kinds of lenders, individual and corporate, throughout the nation. The dangers of subjecting the same interest income of such lenders to the often complex, confusing and overlapping tax systems of several or many states must be considered

carefully. The potential in the Mississippi Supreme Court's opinion for multiple state taxation of the same interest income is tremendous. The theory adopted by the Mississippi court will allow assessment of income tax against out-of-state lenders, as to loans secured by Mississippi real estate, regardless of whether the investor made or bought the loan, whether the debtor is a resident of the taxing state, or whether the investor looked to the security for satisfaction of the debt. The case is, also, of major significance to borrowers throughout the country since multiple state taxation of the same interest income is certain to cause the lender to raise its interest charges. The case may also have an impact on other types of financing transactions, involving real estate, such as leverage leasing, on combination loans involving both real and personal property as security, and on financing transactions involving only personal property where a security statement must be recorded, such as an equipment loan.

Failure to reverse the Mississippi Supreme Court opinion will validate the Mississippi State Tax Commission's assessment of an income tax on interest income earned by any remote nonresident on a casual loan, not amounting to the operation of a trade or business, simply because it is secured by real estate or personal property partially located in Mississippi. It also may apply to loans made between a nonresident debtor and a nonresident creditor simply because it covers Mississippi realty. If the court's decision is extended to the limits of its logic, any nonresident investor acquiring loans secured by Mississippi real property as part of a package of loans from a nonresident underwriter or broker must pay a Mississippi income tax. The impediments this taxing

scheme could impose on conventional methods of finance could be monumental. In instances of loans secured by a multiplicity of security, an income tax on the entire interest income could be assessed by each state in which a portion of the security is located, by the state in which the creditor is a legal or commercial domiciliary, etc. (See pages 26-27, *infra*). Quintuple or sextuple taxation could result.

This case has already caused the Mississippi State Tax Commission to assert similar taxes against other taxpayers and is, therefore, of significance to them and all foreign lenders on Mississippi realty.

Failure to review and reverse the Mississippi Court's decision will permit a contingent protection, opportunity, or benefit to suffice as the sole basis for taxing an out-of-state lender's entire interest income and thus distort the test in *Wisconsin v. J. C. Penney Company* by allowing a "protection, opportunity, or benefit" unconnected with the nonresident's intangible property to support the taxation.

Not only will the Mississippi Court's holding validate such income taxation, but the ruling may precipitate passage of similar legislation by other states resulting in even more taxation in violation of the due process clause, and multiple harm to Appellant and other lenders who conduct their lending businesses in many states. This may result not only as to state income taxation but also, all other forms of state taxation as to which apportionment may be a question.

A failure to hear this case on the merits will result in uncertainty over the constitutionality of a state's power to tax a nonresident's interest income accruing on loans secured by real property within the taxing state but evidenced by a promissory note held outside the taxing state. The importance and scope of this question, as well as the confusion in the legal decisions on this point, require that this Court hear this case on its merits.

CONCLUSION

Probable jurisdiction should be noted and the decision of the Mississippi Supreme Court should be reversed summarily.

Respectfully submitted,

L. ARNOLD PYLE
WARREN V. LUDLAM, JR.
DAVID B. GRISHMAN
Warren V. Ludlam, Jr.
Counsel for Appellant

May, 1977

CERTIFICATE OF SERVICE

I, WARREN V. LUDLAM, JR., one of the attorneys for Appellant, John Hancock Mutual Life Insurance Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of May, 1977, I served a copy of the foregoing Jurisdictional Statement on the parties required to be served by mailing a copy of same by United States mail, First Class, postage prepaid, to Mr. James H. Haddock, one of the attorneys for Appellee, Charles R. Brady, Chairman, State Tax Commission, Post Office Box 960, Jackson, Mississippi, 39205.

Warren V. Ludlam Jr.

WARREN V. LUDLAM, JR.
Attorney for John Hancock Mutual Life Insurance Company

APPENDIX "A"

In the Supreme Court of Mississippi

No. 48,955

Charles R. Brady, Chairman
State Tax Commission
Petitioner/Appellant

versus

John Hancock Mutual Life
Insurance Company
Respondent/Appellee

BEFORE PATTERSON, SMITH AND LEE

PATTERSON, Presiding Justice, for the Court:

The Mississippi State Tax Commission brings this appeal from a decree of the Chancery Court of the First Judicial District of Hinds County. It held John Hancock Mutual Life Insurance Company was not subject to Mississippi state income tax upon interest from its mortgage loan investments within this state. The decree reversed an order of the Mississippi State Tax Commission of May 15, 1973, assessing income tax and interest of $228,481.19 against John Hancock Mutual Life Insurance Company on interest income for the taxable years 1969, 1970 and 1971 from loans secured by real property situated in this state.

The appellee, John Hancock Mutual Life Insurance Company, hereinafter Hancock, is a foreign corporation qualified with the State Insurance Commission to conduct life, health, accident and variable insurance business in Mississippi. It is not qualified with the Secretary of State or other agency to conduct a different business within the state. The mortgage investment and insurance activities of Hancock are separated into two divisions, but when combined, constitute the corporation. The Mississippi State Tax Commission, hereinafter Commission, contends the divisions of Hancock are interrelated and dependent upon each other because the premium income from insurance is invested into mortgage loans from which interest income is earned. This income is then employed by Hancock to service its insurance obligations and any surplus remaining is returned to its policyholders through dividends. We note that for two of the three years spanning this case Hancock experienced a net loss from its insurance business within the state, but when the mortgage investment income was included, a net profit resulted.

Hancock acknowledges that an insurance company must receive income from investments for the conduct of its business. It maintains, however, that the investments secured by property within this state are separate and apart from its insurance business.

As part of its overall business the appellee makes loans to local residents secured by mortgages on real property within the state. These loans are closed, the deeds of trust are recorded and foreclosures, when necessary, are conducted within this state. A member of the local bar is substituted as trustee by Hancock to

transact foreclosures. All notes, deeds of trust and mortgages are transferred to Hancock's domicile in Massachusetts after the loans are closed and the deeds of trust are recorded in the county of the security.

Hancock maintains insurance offices and agents in the state. It engages a salaried employee who devotes his time exclusively to its mortgage lending business in Mississippi, Arkansas and Louisiana. This employee works from the appellee's office in Memphis, Tennessee one or more days each week. However, since he resides in Cleveland, Mississippi, the Commission contends he utilizes his home as an office the remainder of the week for the appellee's in-state mortgage lending activities. Hancock owned 300, estimated, Mississippi farm loans during the tax period in dispute.

Hancock's residential and commercial loans secured by local property were transacted through Bridges Loan & Investment Company of Jackson, Mississippi for the time involved. Bridges was without restriction to conduct similar business with other investment companies. Its activities for Hancock were substantial and paid for by a percentage of annual interest collected.

For the years 1969, 1970 and 1971 Hancock paid no state income tax on the interest income earned from its mortgage lending activities in Mississippi. The Commission, then chaired by Arny Rhoden, pursuant to Mississippi Code Annotated section 27-7-23 (1)(a) (1972) and 27-7-49 (1972), assessed the company $223,-456.60 in income taxes for these years. The assessment was based upon a net investment in Mississippi

for interest income of $2,235,604 in 1969, $2,184,941 in 1970 and $2,160,993 in 1971.

The parties agree the promissory notes are "intangibles" for tax purposes.

On appeal from the Commission's order to the Chancery Court in a trial de novo [Mississippi Code Annotated section 27-7-73 (1972)] the court concluded:

> The issue is simply whether the Commission's assessment should be upheld under the theory that the promissory notes in question have acquired a "business, commercial or actual situs" within this state, or whether in accord with Hancock's contentions, there is not a sufficient nexus to link evidences of ownership of intangible property with any such situs.

After stating the issue, the chancellor found, among other things:

> . . . It is axiomatic that an insurance company must make investments and receive income therefrom for the proper conduct of its business. . . .
>
> * * * *
>
> Hancock makes mortgage loans to Mississippi residents, secured by real property within this state. Its lending activities are separate and apart from its insurance business.
>
> . . .

The court concluded the agreement of Hancock with Bridges was nonexclusive and that the method utilized by it in investing mortgage money was the same as other non-resident investors. It also determined the officials of the Tax Commission, as well as former officials, were for many years aware of the exclusion from tax of intangible income secured by property in this state prior to the present assessment.

In construing Mississippi Code Annotated section 27-7-23 (1972), designating the items of gross income of foreign corporations classified as derivative from sources within this state, the trial judge was of the opinion the section contained conflicting specific and general provisions necessitating a choice between the two to determine which had application. He concluded the specific portion of the statute to be:

> Net income of nonresident and foreign taxpayers:
>
> (1) In the case of foreign corporations or of individuals, partnerships, trusts or estates, not residents of the State of Mississippi, the following items of gross income shall be treated as income from sources within the state:
>
> (a) Income from intangible property of any kind or nature, *if the evidence of ownership has acquired a business, commercial, or actual situs in this state;* . . . (Emphasis added.)

Thus it prevailed over the last sentence of Subsection (1)(a) which the court considered general and nonspecific. It follows:

> There shall be reported any and all income from activities or transactions engaged in within this state for the purpose of financial profit or gain, whether or not the taxpayer is qualified to do business in this state, maintains an office or place of business, or the activity or transaction is in, or connected with, interstate or foreign commerce.

The trial court construed the first section to require evidence of business situs. It thereby rejected the Commission's contention that the lands are protected by the laws of this state, the deeds of trust are of record in this state and the laws of this state protect the mortgagee and furnish the sole means of enforcing its lien. The basis for rejection was that the facts were insufficient to create a nexus between the security and the intangibles, the notes.

The trial court, in separate findings, held the evidence did not establish a business connection between Hancock's insurance division and investment division within the state so that the income-producing intangibles could be taxed here.

Finally, it held that the Commission regulations were so long continued they had, in effect, the force of law because the legislature, aware of the regulations, had acquiesced therein by not enacting laws to the contrary.

We first address the trial court's construction of the statute. In doing so we think the legislature's intention must be determined by the total language of the stat-

ute and not from a segment considered apart from the remainder that the overall intention may be decided without adjudicating which of two provisions prevails. It is also proper in considering intent to use the ordinary meaning of words at the time and under the circumstances in which they were written. In *Fortenberry v. State*, 190 Miss. 729, 1 So.2d 585 (1941), we stated:

> In considering the meaning and effect of a new and supplemental enactment, which by an express provision disclaims the purpose to repeal any existing law, there is, more than in the ordinary case, the duty of the court to take into consideration all the facts and circumstances leading up to the new enactment, the developments in the history of the times and the particular characteristics of the specific evil which the new and supplemental statute was designed to curb, ... (190 Miss. at 735-736, 1 So.2d at 587)

Regardless of whether the trial court was correct in finding the first portion of the statute was specific and prevailed over the latter and general portion of the statute, there remains the necessity of deciding if the construction placed upon the specific portion correctly reflected the legislative intention.

We observe the times, history and interpretations of the statute as it progressed to its present form to determine the real intention of the legislature. *See Zeigler v. Zeigler*, 174 Miss. 302, 164 So. 768 (1935). The state's first income tax law was enacted in 1912. Section

15(1)(a), Chapter 132, Laws of 1924, expressed the law as it was rewritten in pertinent part:

> Section 15. (1) That in the case of foreign corporations . . . the following items of gross income shall be treated as income from sources within the state.
>
> (a) . . . [I]nterest on bonds, notes, or other interest bearing obligations of residents, . . . *provided, income from money loaned by . . . foreign corporations . . . shall not be included as taxable income* . . . . (Emphasis added.)

The law was rewritten in 1934 and 1936 without material change in the provisions now pertinent.

The Commission's contemporaneous interpretation of the statute, for administrative purposes, and part of its history appears in its Regulation Number 1 (1924), Article 166, as follows:

> Nonresidents, foreign corporations, and citizens of foreign countries shall include as gross income from sources within the State all income of every sort derived from business done or property located within the State; *except that interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, need not be included.* (Emphasis added.)

The Commission's Regulations for 1928, 1932, 1934 and 1937 remained the same. We observe the statute and

regulations by excepting from the income of nonresidents the interest on residents' notes or interest-bearing obligations, evidently led to the belief of a disparity between the assessment of interest income of domestic and foreign corporations.

A suit followed in 1938 for construction of Section 15(1)(a) above. This Court determined the legislature's intention was that domestic and foreign corporations were to be treated equally. In *Mississippi Cottonseed Products Co. v. Stone*, 184 Miss. 409, 184 So. 428 (1938), cert. den., 306 U.S. 656, 56 S.Ct. 774, 83 L.Ed. 1054 (1939), we held by considering the statute in its entirety that the legislature intended, in enumerating the items of gross income of a foreign corporation, to use the word "to" in the statute instead of the word "by" and substituted "to" for "by" so that the reading of Section 15 (1)(a) was:

> [P]rovided, income from any loan *to* nonresidents or foreign corporations or citizens of a foreign country, shall not be included as taxable income. . . . (Emphasis added.)

As a result the Commission altered its interpretation of the statute. Its Regulations in 1939, Article 245, read in part:

> Nonresidents, foreign corporations, and citizens of foreign countries shall include as gross income from sources within the State all income of every sort *derived from business done or property located within the State.* (Emphasis added.)

This regulation concerning income of foreign corporations was carried forward in Regulation Number 7 (1942), Number 8 (1946) and Number 9 (1948).

It is apparent, as the trial court found, that after the *Mississippi Cottonseed Products* case, *supra*, the Commission gave literal application to the maxim *mobilia sequuntur personam*, meaning movables follow the person. The Commission's position prior to *Mississippi Cottonseed Products* was that interest on intangibles held by foreign corporations, secured by in-state real property, was not considered gross income for tax purposes because of the language of the statute. After the decision, the Commission concluded that such income must be included for tax assessment if derived from business done or from property located within the state. In practice, however, this meant that interest income from notes held out of state, though secured by in-state property, was not considered generated here for tax assessments because it was thought the income was produced at the place where the note was held.

An exception, largely theoretical, to this practice existed if there was a nexus sufficient to connect the intangibles with a "business situs" in Mississippi. These conclusions and practices of the Commission are not inconsistent with *Jahier v. Rascoe*, 62 Miss. 699 (1885); *City of Vicksburg v. Armour Packing Co.*, 24 So. 224 (Miss. 1898); and *Gully v. C.I.T. Corporation*, 168 Miss. 268, 150 So. 367 (1933), which hold that the situs of intangible property is generally the domicile of the owner. The cases acknowledge the difficulty of determining business situs, but conclude that it was, more or less, connected with a degree of permanence

of location of the credits, or with a purpose to incorporate them when collected into the mass of property already in the state.

The difficulty in appl' ation of the exception did not pass unnoticed. In 1950 Henry N. Eason, Chief of the Division of Income Tax, and other officials of the Tax Commission, including the general counsel, appeared before a tax study committee of the legislature for the purpose of outlining recommendations for changes in the tax laws. Among those submitted were: That the income tax law be rewritten and that an amendment be made relating to the definition of "gross income received by a nonresident," because the Income Tax Division had consistently held income from intangible property held out of state could not be taxed unless there was an in-state business situs. On October 4, 1950, Eason submitted a report to the Chairman of the Commission detailing its recommendation to the legislature. It was:

> [This Section] related to nonresidents or foreign taxpayers. Subsection 1(a) recites the items of gross income which shall be treated as gross income within the State. I quote a part of that Subsection:
>
> Insurance premiums, interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise; the amount received as dividends from domestic corporations, provided, income from any loan to nonresidents or foreign corporations, or citizens of a foreign country, shall not be

included as taxable income, or from foreign corporations of which more than fifty percent of the gross income was derived from sources within the State. *This language should be stricken from the statute for the reason that we cannot tax the intangible income of a nonresident unless the evidence of ownership has acquired a business situs within Mississippi.* There might be substituted therefor, "Insurance premiums and income from intangibles, when the intangible property which produces the income has acquired a business situs within this State. . . ." (Emphasis added.)

The next legislative session amended the Income Tax Law by rewriting Section 11, Chapter 402, Laws of 1952. It appeared as Section 9220-12, Mississippi Code of 1942, Recompiled, in part as follows:

(1) In the case of foreign corporations . . . the following items of gross income shall be treated as income from sources within this State:

(a) Interest on . . . notes or other interest-bearing obligations, . . . *if the evidence of ownership has acquired a business situs in this state.* (Emphasis added.)

Afterward, the regulations of the Commission continued to recite that income from intangibles held out of state was to be considered as having an in-state source if it was derived from services rendered, business done, or from property located within the state, i.e. a business situs.

The critical issue remained as before, what criteria were employed in determining business situs. The Commission's attitude was perhaps best expressed by its Regulation Number 7 issued before the 1952 act and Regulations Numbers 10 and 11 thereafter repeating it. The regulation:

Intangible personal property has a business situs in this State if it is employed as capital in this State or the possession and control of the property has been localized in connection with a business, trade or profession in this State so that its substantial use and value attach to and become an asset of the business, trade or profession in this State. *For example . . . if a nonresident maintains a branch office here and a bank account on which the agent in charge of the branch office may draw for the payment of expenses in connection with the activities in this State, the bank account has a business situs here.* (Emphasis added.)

This interpretation was consistent with the Commission's policy for years. It maintained that a "business situs" required a degree of permanence evidenced by offices, agents, bank accoun[t] [s]ome such symbol. This premise was likely [t]ught necessary to overcome the inference arising fr[om] the legal fiction of *mobilia sequuntur personam* as well as analogy to our case law. In the past we have held that promissory notes evidence the debt and deeds of trust evidence the security, and a mortgagee, until foreclosure, has only a chattel interest in the land because the mortgag[e] only a charge upon and not an interest in it. Buckley v. Daley, 45 Miss. 338 (1871).

The latest pronouncement of this rule is found in *Baker v. Connecticut General Life Insurance Co.*, 196 Miss. 701, 18 So.2d 438 (1944), wherein it is stated:

> The beneficiary in a deed of trust the character of the one here in question is not vested with the title to the land described therein. He has no estate in the land, and cannot convey it to another; he has an interest in it only to the extent that he can cause the trustee in the deed of trust to sell the land and apply its proceeds to the payment of the secured debt . . . .

By whatever means the Commission was influenced to its interpretation of the statute, in simple application it meant that promissory notes secured by real property in this state when transferred to a nonresident owner had the effect of transmitting the source of income to the nonresident's state. The "business situs" was thus indelibly stamped upon the state in which the intangible was held, thereby precluding income assessment in this state. The Commission's response to inquiries compels this conclusion. A letter of October 3, 1957, from the Income Tax Division to United Benefit Life Insurance Company of Omaha, Nebraska, is typical. It follows:

> Your income from policy loans is derived from promissory notes executed by the policy holders. These notes, being intangible property, have a situs at your domicile unless they have acquired a business situs elsewhere. To give your notes from Mississippi policy holders a business situs in this state I believe

> that they would have to be accepted in Mississippi, be physically located here, the payments thereon be received and accepted here and, generally, all matters pertaining to the making, collection and handling of such notes be under the full authority of a Mississippi office as if your investment department had been decentralized to that extent.

The statute, now Mississippi Code Annotated section 27-7-23 (1972) again received the consideration of the legislature in 1958 when it was amended to its present language. That part of present concern is:

> (a) Income from intangible property of any kind or nature, *if the evidence of ownership has acquired a business, commercial or actual situs in this state* . . . . (Emphasis added.)

The legislative addition of "commercial or actual" preceding "situs," had no effect upon the Commission's assessment of income from intangibles.

The assistant to the Commission Chairman, H. I. Adcock, testified that he had been with the Commission since 1937 and that the 1958 act brought no change of policy toward intangible property held by nonresidents until a contrary position, the beginning of this suit, was taken in 1972.

Henry N. Eason was called by Hancock as an adverse witness and stated that he was Chief of the State Income Tax Division for many years preceding his retirement in 1965. He testified the Commission's policy, when intangible property was owned outside the state though secured by local property, was not to assess such income for income tax and neither the 1952 or 1958 legislative acts altered this position.

Attorney Henry A. Fly was employed by the Commission from 1947 to 1961. His primary duties were with income and franchise taxes. He testified the Commission's position was that notes held outside Mississippi, although secured here, did not have local business situs and interest therefrom was not taxable.

These positions were the same as expressed on January 5, 1953, through a certificate of overpayment executed by A. H. Stone, Chairman of the Commission, to the Auditor of Public Accounts, concerning a refund of taxes to Commonwealth Insurance Company. The certificate stated in explanation:

> . . . It is well established that a nonresident may not be taxed on intangible income unless the assets which produce the income acquire a business situs in Mississippi . . . .

The trial court concluded that interest income from intangibles held out of state could not be subject to income tax unless (a) the evidence of indebtedness was kept in this state, in which case it would have an actual situs, or (b) such interest income was employed as capital in this state, or (c) such interest income was localized in this state with the business of such non-

resident or foreign corporation, or (d) such interest had become an asset of the business of the foreign corporation in this state. It was further held that the Commission's policy, substantially as above, was well known to nonresidents and foreign corporations for many years prior to this assessment.

The issues presented are, whether the trial court correctly construed the legislature's intention in amending the statute in 1952 and 1958, whether there was error in finding the decentralization of Hancock for the conduct of its business separated the divisions for income tax assessments and finally, whether long-continued administrative construction has the effect of law.

We are of the opinion the lower court erred in its construction of Mississippi Code Annotated section 27-7-23 (1972) as did the Commission prior to the assessment. The Commission's recommendation to the legislature preceding the 1952 amendment referred to its inability to assess income from intangibles held by nonresidents. It specifically recommended:

> . . . This language should be stricken from the statute for the reason that we cannot tax the intangible 'ncome of a nonresident *unless the evidence of ownership has acquired a business situs within Mississippi.* There might be substituted therefor, "Insurance premiums and income from intangibles when the intangible property which produces the income has acquired a business situs within this State . . . ." (Emphasis added.)

The legislature reacted to the Commission's plea, "we cannot tax the intangible income of a nonresident" by adopting the words "unless the evidence of ownership has acquired a business situs within Mississippi." This language was transferred almost verbatim from the recommendation into the existing statute so that it read:

> (1) In the case of foreign corporations . . . the following items of gross income shall be treated as income from sources within this state:
>
> (a) Interest on . . . notes or other interest-bearing obligations, . . . *if the evidence of ownership has acquired a business situs in this state.* (Emphasis added.)

In our opinion the amendment expressed the legislative purpose of taxing income generated from out-of-state intangibles, secured here, by substituting "evidence of ownership" for the actual business situs concept previously thought essential provided such evidence had acquired an in-state business situs. It intended to deemphasize the importance the Commission had previously attached to business situs as a necessary element of the assessment. We are persuaded to this view by the words lifted from the recommendation as well as those suggested by it but which were rejected. The adoption of the suggested words, "insurance premiums and income from intangibles when the intangible property which produces the income has acquired a business situs within the state" would have continued income assessments contingent upon there being an in-state

business situs with its attendant connotations of permanence, agents, bank accounts and capital. We think the legislature intended to remove such impediments to the collection of taxes from intangibles by replacing it with "evidence of ownership," a less burdensome standard.

Incidental to the foregoing we have held the court's duty in construing statutes is to give consideration to the purpose and the object to be accomplished so the real intention of the legislature may be reached. We stated statutes should be given a reasonable construction, and if susceptible of more than one interpretation, they must be given that which will best effectuate their purposes rather than one which would defeat them. *Akers v. Estate of Johnson,* 236 So.2d 437 (Miss. 1970); *Mississippi State Tax Comm'n v. Hinton,* 218 So.2d 740 (Miss. 1969); *Thornhill, et al v. Ford,* 213 Miss. 49, 56 So. 23 (1952); *Conrad Furniture Co. v. Mississippi State Tax Comm'n,* 160 Miss. 185, 133 So. 652 (1931); and *State Bd. of Education v. Mobile & O. R. Co.,* 72 Miss. 236, 16 So. 489 (1895). Moreover, meaning must be given to the amending words as they mesh into the statute because they were legislatively chosen for definite purpose. In construing the statute to diminish the burden of establishing business situs and replacing it with evidence of ownership of the intangible, we are able to give meaning to the amending words consistent with the legislature's purpose of collecting taxes, its real intention.

Unfortunately, the phrase "business situs" was retained in the statute thereby frustrating the legislative intent because the Commission's practices continued as before. The Commission's interpretation

not only overlooked the amendment, but also the last portion of the statute,[1] which it complemented, requiring all income from business activities within the state to be reported.

Undoubtedly, this construction led to the 1958 amendment which added the following emphasized words to the statute, "if the evidence of ownership has acquired a business, *commercial or actual* situs in this state." This amendment reemphasized the legislature's intention to assess income from intangibles through evidence of ownership by broadening it beyond a business situs. Again, the words "commercial" and "actual" were deliberately chosen by the legislature in its widsom for an intended purpose.

This elicits the query, what evidence of ownership did the legislature intend by "commercial" or "actual" situs in this state? The logical response in giving meaning to the words to accomplish the legislative purpose must be, we think, the evidences arising from the recorded security, the deed of trust, because it has commercial meaning in that it is connected with business trade and traffic in general as well as actual situs in the place of its recordation. Not only does the recordation "evidence" the security, it evidences the ownership of the intangible and thus protects the beneficiary's interest therein. It evidences also the nexus between the security and the promissory note

1 . . . There shall be reported any and all income from activities or transactions engaged in within this state for the purpose of financial profit or gain, whether or not the taxpayer is qualified to do business in this state, maintains an office or place of business, or the activity or transaction is in, or connected with, interstate or foreign commerce.

for the business benefit of both the maker and the holder of the note.

This connection of security and debt, known to the legislature, springs directly from Mississippi Code Annotated sections 89-7-3 (1972) which requires all deeds of trust whatsoever to be recorded to protect the beneficiary against the claim of subsequent creditors or purchasers. Section 89-5-17 directs that all assignments of indebtedness secured by a deed of trust be entered on the margin of the record and provides penalty for failure to do so. Section 89-5-21 requires the satisfaction of a deed of trust to be entered upon the record and again provides penalty for failure to do so. Section 89-5-37 mandates that the name of the beneficiary be disclosed in the deed of trust and provides penalty for failure to comply. Finally, Section 89-5-45 voids the substitution of a trustee in deeds of trust unless it appears of record in the office of the county where the land is situated.

We conclude the legislature intended by evidence of ownership to refer to the instrument actually used to describe the security for the intangible because it names the beneficiary, the mode and time of payment, the assignments, and substitution of trustees, if any, as well as the note's satisfaction when paid, all of which "evidence" ownership. Moreover, when recorded, this evidence has an actual situs in the county of the security. We conclude the trial court erred in its construction of the statute because it defeated the legislative purpose. This gives recognition to the mortgagee's interest in the security even though it only be a charge upon the security and not a vested interest in it. Indeed, the rudimentary genesis of interest

income is a combination of the security and debt and not a separation of it. The legal fiction of *mobilia sequuntur personam* transferring the interest generating intangible to the domicile of a foreign corporation or nonresident must give way to the business reality that the security breathes life into the note and is inextricably embedded in it, defying such separation.

We are of the further opinion that the division of the corporation by Hancock did not separate the insurance and investment functions for income assessment purposes. Hancock's argument appears paradoxical in that it contends on one hand that an insurance company must make investments and receive income therefrom for the conduct of its business and on the other that it is separated for tax purposes. But be this as it may, the evidence is overwhelming that Hancock has offices and agents conducting its insurance business within this state in substantial amount. It also reveals that for two of the three years spanning the assessments, the investments division income resulted in an overall profit for the corporation. It reflects also that the agents, and other personnel, when inquiry was made concerning loans, were instructed to direct loan applicants to its salaried investment employee for the conduct of this business. We are of the opinion the two divisions of Hancock are interdependent and related to each other for income tax assessments and that the trial court erred in finding they were separate and independent.

The finding that the administrative policy of the Commission had been consistent since 1924 until this assessment in 1972 is doubtless correct. The conclu-

sion that the legislature knew or was presumed to have known of the policies is also supported in law. However, the trial court's conclusion that the legislature intended to abide by the Commission's interpretations because it did not define the term "business situs" was error. This determination overlooks the 1952 and 1958 statutory amendments which were designed to change the former constructions and practices so the income from intangibles would be taxed. We are of the opinion the construction for administrative purposes though continued was erroneous and does not have the force of law. In *Commissioner v. Lake*, 356 U.S. 260, 78 S.Ct. 691, 2 L.Ed.2d 743, reh. den., 356 U.S. 964, 78 S.Ct. 991, 2 L.Ed.2d 1071 (1958), it was held:

> . . . Prior administrative practices are always subject to change through exercise by the administrative agency of its continuing rule-making power.

It follows that if an administrative body has the authority to change its practices, they are also subject to change by judicial opinion or legislative enactment. In *Barr v. Delta & Pine Land Co.*, 199 So.2d 269 (Miss. 1967), we held the construction of a statute by those administering it is usually binding on them or their successors because the public relies upon it, but this did not mean that an administrative body was powerless to change its interpretation by a new rule under changed situation or varied circumstance. We also held that legislative enactment or court decision supersedes administrative construction which places it beyond repeal by subsequent administrative rule change so long as the statute remains substantially

unchanged. In sum, we are of the opinion the amendments were properly construed by the Commission in 1972 when this assessment was made and that the trial court erred in invalidating it.

On cross-appeal Hancock argues the trial court erred in not finding the Commission's assessment unconstitutional in that it transgresses upon the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article 3, Section 14 of the Mississippi Constitution (1890) and impinges upon the interstate commerce provision of Article 1, Section 3, Clause 3, of the Constitution of the United States. We are of the opinion the cross-appeal is without merit in view of the holding in *Curry v. McCanless*, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339 (1938), and our holding in *Akers v. Estate of Johnson*, 236 So.2d 437 (Miss. 1970).

The decree of the chancery court is reversed and the order of the Tax Commission is reinstated.

REVERSED AND ORDER OF THE TAX COMMISSION REINSTATED.

GILLESPIE, C.J., INZER, P.J., SMITH, ROBERTSON, SUGG, WALKER, BROOM AND LEE, JJ., CONCUR.

APPENDIX "B"

In the Chancery Court of the
First Judicial District of Hinds County, Mississippi
No. 89,680

John Hancock Mutual
Life Insurance Company
Petitioner

vs.

Charles R. Brady, Chairman, and
Mississippi State Tax Commission
Respondents

OPINION OF THE COURT

Filed: Apr. 1, 1975

This is an appeal from an order of the Mississippi State Tax Commission (Commission) rendered on May 15, 1973, requiring John Hancock Mutual Life Insurance Company (Hancock), a Massachusetts Corporation, to pay the sum of $228,481.19 which the Commission found to be due for taxes on interest income received by Hancock as the result of mortgage lending activities in the State of Mississippi for the years 1969, 1970 and 1971. The Commission made its assessment of such income taxes in the year 1972. Hancock seasonably appealed to the Board of Review of the State Tax Commission, where the assessment was affirmed on February 6, 1973. Hancock then appealed to

the full Tax Commission, where the assessment was upheld by the said order of May 15, 1973.

The amount claimed by the Commission to be due and unpaid was shown by its audit of August, 1972, to be in the sum of $223,456.60. The amount set out in the order of May 15, 1973, included interest to the date of rendition. Hancock appealed to this Court, and filed its petition for a *de novo* trial, under the terms and provisions of Section 9220-31, Miss. Code 1942 (Section 27-7-73, Miss. Code 1972). The Commission answered and made its answer a cross-bill.

Principally, this case involves the application of the maxim *mobilia sequuntur personam*, that is to say, that "movables follow the person." The "movables" in this case are promissory notes evidencing ownership of intangible property. Briefly, the facts are as follows:

Hancock is a foreign insurance company qualified with the State Insurance Commission to conduct a life insurance, health and accident insurance and variable annuity business in the State of Mississippi. It is not qualified with the Secretary of State or any other agency to conduct any other business or activity within the state.

It is axiomatic that an insurance company must make investments and receive income therefrom for the proper conduct of its business. Hancock engages in such investment activities throughout the United States. Toward this end, its business is departmentalized as follows: (1) insurance operations

department, (2) financial department, and (3) servicing group.

Hancock makes mortgage loans to Mississippi residents, secured by real property within this state. Its lending activities are separate and apart from its insurance business. Its insurance operation is not involved with its mortgage loan activities, and its mortgage loan operation is not involved with insurance. Its insurance agents in this state are specifically instructed that they have no responsibility whatever in the area of mortgage loans, and they are not authorized to engage in loan activities.

It makes two types of real property loans, namely, (1) "farm loans" and (2) "city loans", the latter being loans on residential and income-producing (commercial) property.

Its farm loan operation is conducted from its Regional Office in Memphis, Tennessee, through an Agricultural Investment Officer. The Memphis Regional office employed a Field Representative (field man), Mr. Kirk, during 1969, 1970, and 1971, who worked in Mississippi, Louisiana, and Arkansas. Mr. Kirk lived in Cleveland, Mississippi. He maintained office space at the Memphis office, and as a rule spent approximately one and one-half days each week in Memphis.

According to the testimony of Charles C. Pope, the Agricultural Investment Officer, these farm loans are initiated by application directly from the borrower, or through a broker who receives a fee paid by the applicant. These brokers are not employed by Hancock, and

as a rule they initiate loans for a number of lending agencies.

When the application is received, the field man is called upon to contact the broker or borrower, obtain a correct land description, ascertain the borrower's financial condition, and make an inspection and appraisal of the security. He then submits a report to the Memphis office either recommending the loan or advising against it. In his contact with the broker or borrower, the field man has no authority to commit Hancock or enter into any binding agreement.

All data relative to the application, together with the recommendations of the field man and of the Agricultural Investment Officer, are forwarded to the Hancock home office in Boston Massachusetts. The Boston office, and that office only, has authority to make the loan commitment. If the loan application is approved in Boston, the Memphis office is so advised by telegram. The Agricultural Investment Officer prepares a letter of commitment which is sent directly to the borrower.

Loan closing is handled by a title insurance company. Hancock has no "list" of loan-closing attorneys, and the borrower can employ the attorney of his choice for this purpose, so long as he is acceptable to the title insurance company. The attorney is paid by the borrower.

When closing has been accomplished, the deed of trust is placed of record in the proper county. Mr. Pope, a resident of Memphis, is designated as trustee.

All of the papers and documents relative to the loan are gathered into a "package" which consists of (1) the application, (2) the appraisal report, (3) a copy of the commitment letter, (4) the promissory note, (5) the deed of trust, (6) the loan-closing statement, and (7) the title insurance policy. This "package" is kept by Hancock in its home office in Boston.

In the event of foreclosure occasioned by nonpayment, a Mississippi attorney is selected by Hancock as substituted trustee. Parenthetically, Mr. Pope testified that during his employment with Hancock (i.e., since 1951) there have been only "about four" foreclosures of farm loans by Hancock in this state.

During the time in question, i. e., the years 1969, 1970, and 1971, Hancock's farm loans were handled in the manner outlined above. During this period Hancock had an estimated three hundred farm loans in Mississippi.

Hancock's residential and commercial property loans were accomplished through a correspondent in this state for the period of time here in question. In 1948, W. P. Bridges, of Jackson, Mississippi, acting in an individual capacity, entered into a correspondent's contract with Hancock. In 1961, a new contract was entered into between Hancock and Bridges Loan and Investment Company, Inc., of Jackson, Mississippi, (hereinafter referred to as Bridges).

Under the terms of this contract Bridges was an independent contractor. Bridges was not restricted by the contract insofar as dealing with other investment companies was concerned; in fact, the evidence shows

that Bridges had approximately 26 such arrangements whereby it was correspondent for other lending agencies such as banks, other insurance companies, etc.

Bridges is in the business of originating mortgage loans and selling the paper to various investors. Under contractural arrangements, it services the loans originated by it for these investors. Bridges collects the installments, handles the payment of ad valorem taxes, sees that insurance is maintained on the property, and handles delinquent installments.

In its dealings with Hancock, Bridges' remuneration was not based on a fixed amount, but was determined by a percentage of annual interest collected.

Sale of mortgage notes was done in one of two ways: (1) Bridges would finance the purchase of realty and receive a note from the borrower secured by the property, and then sell the note to Hancock, or else (2) a "third Party" mortgage arrangement was carried out involving funds supplied by a local bank, and the note and deed of trust would then be sold through Bridges to Hancock. In cases involving the latter procedure, Hancock bought these mortgages in blocks of 15 to 20 at a time.

Regarding the relationship between Hancock and Bridges, Mr. W. Parham Bridges, Jr., an officer of Bridges, in answer to a question asked by Hancock's solicitor, testified, "We were not obligated to sell to them, and they were not obligated to buy from us." In other words, this correspondent's contract was not an

exclusive agreement. This testimony was corroborated by the testimony of officers of Hancock.

The mortgage installments collected by Bridges were sent directly to Hancock in Boston after deducting the servicing fee and the amounts included within the installments allocated to the payment of taxes and insurance. Bridges maintained a trust account for the accumulation of funds with which to pay the taxes and insurance premiums as same became due. Hancock did not maintain a bank account in this state in connection with its business with its correspondent, and Bridges did not reinvest Hancock's money.

Mr. Bridges testified that Hancock terminated its servicing arrangement with Bridges some time "in 1969 or 1970". However, Bridges continued to sell mortgage notes to Hancock.

The evidence indicated that practically the identical methods utilized by Hancock in investing mortgage money in Mississippi were also utilized by other insurance companies and investors. Testimony given by Tax Commission officials, former officials and top-ranked employees clearly showed that the Commission knew of these methods, plans and arrangements for many years prior to the assessment made against Hancock in 1972.

The issue is simply whether the Commission's assessment should be upheld under the theory that the promissory notes in question have acquired a "business, commercial or actual situs" within this state, or whether, in accord with Hancock's conten-

tions, there is not a sufficient nexus to link the evidences of ownership of intangible property with any such situs.

I.

At the threshold of this decision, it is necessary to construe the language of the statute involved in this case in order to ascertain which of two inconsistent provisions is applicable.

Section 9220-12(1)(a), as amended, Miss.Code 1942 [Sec. 27-7-23(1)(a), Miss.Code 1972] sets out the items of gross income of foreign corporations or individuals, partnerships, trusts or estates, not residents of the State of Mississippi, which shall be treated as income from sources within the state. This statute contains both specific and general provisions. The portion set out with specificity is as follows:

> "(1) In the case of foreign corporations or of individuals, partnerships, trusts or estates, not residents of the State of Mississippi, the following items of gross income shall be treated as income from sources within the state:
>
> "(a) Income from intangible property of any kind or nature, *if the evidence of ownership has acquired a business, commercial, or actual situs in this state* . . ." (Emphasis supplied)

The last full sentence of subsection (1)(a) is in very general and unspecific language, as follows:

> "There shall be reported any and all income from activities or transactions engaged in within this state for the purpose of financial profit or gain, whether or not the taxpayer is qualified to do business in this state, maintains an office or place of business, or the activity or transaction is in, or connected with, interstate or foreign commerce."

There is an inconsistency between the general and the specific provisions of this statute. In such cases, it is a well recognized rule that, absent a clear manifestation of a contrary purpose, the specific provisions must govern or control as the clearer and more definite expressions of legislative intent. The general rule in this regard is set out in 82 C.J.S., Statutes, Sec. 347 (b), pp. 720-722 (1953), as follows:

> "General and special provisions in a statute should stand together, if possible, and be read together and, if possible, harmonized with a view to giving effect to a consistent legislative policy. Where, however, general provisions, terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions must govern or control, as a clearer and more definite expression of the legislative will, unless the statute as a whole clearly shows a legislative intention to the contrary, or some other canon of statutory construction compels a contrary conclusion. This is true whether the special provisions precede or follow the general ones, and

> regardless of the otherwise proper construction of the general provisions . . ."

In the case of *White, State Auditor, v. Lowry, Insurance Commissioner, et al.*, 162 Miss. 751, 139 So. 874 (1932), the rule is stated in the following language (139 So. at p. 876):

> ". . . There is therefore involved the application of that well-settled principle in the construction of statutes that, where a statute contains both a particular and a general enactment, and the general enactment in its most comprehensive sense would include what is embraced in the particular one, the latter must be given effect as to all cases which fall within the particular provision, and the general enactment must be taken to embrace only such cases within the general language as are not within the provisions of the particular enactment. 25 R.C.L. p. 1010, and authorities under note 5; 36 Cyc. p. 1130, and authorities under note 69; 2 Lewis' Suth. Stat. Const. p. 744; Black on Interpretation of Laws, p. 201 . . ."

Our Court has applied this rule consistently in a number of cases, among which are: *Greaves v. Hinds County*, 166 Miss. 89, 145 So. 900, 901 (1933); *Gully v. Lumbermen's Mutual Cas. Company*, 176 Miss. 388, 166 So. 541 (1936); *Dunn Construction Co. v. Craig*, 191 Miss. 682, 2 So.2d 166, 170 (1941); *Bailey v. Emmich*, 204 Miss. 666, 37 So.2d 797, 800 (1948); *Madison County Board of Education v. Miles*, 252 Miss. 711, 173 So.2d 425, 427 (1965).

In the opinion of this Court, the specific, or particular, language of the statute must be applied. The "intangible property" in this case consists of mortgage loans made by Hancock to residents of Mississippi. The "evidences of ownership" are the mortgage notes.

The Commission does not seriously contend that these notes have acquired "actual situs" in Mississippi. The word "actual" must be accorded its ordinary meaning, that is to say, existing, present, or real as opposed to something merely possible; in other words, something that exists in fact. Hancock has held these notes in Boston, Massachusetts, since acceptance.

The word "commercial" in its ordinary and strict sense has reference to trafficking in goods, wares, and merchandise; trading, exchanging, purchasing, selling and manufacturing goods and commodities. However, this Court is not unmindful that in a broader sense the terms "commercial situs" and "business situs" may be, and many times are, used synonymously. For example, in *Jordan v. Tashiro*, 278 U.S. 123, 49 S.Ct. 47, 73 L.Ed. 214, it is pointed out that while the words "commercial" and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote as well other occupations and other recognized forms of business enterprise which do not necessarily include trading in merchandise, and although commerce includes traffic in this narrower sense, in a broad sense it embraces every phase of commercial and business activity and intercourse.

The question for determination, under the statute, is whether or not the evidences of ownership of Hancock's mortgage loans have acquired a "business situs" in Mississippi, since, in its broader application, "commercial situs," would be included within that term.

II

The Commission strongly urges that the "business situs" contemplated by the statute is established by the fact that the lands securing Hancock's mortgage notes are situated in the State of Mississippi. It points out that (1) these lands are protected by the laws of this state, (2) the deeds of trust are of record in this state, and (3) the laws of this state protect the mortgagee and furnish it with the sole means of enforcing its claims. It contends that, therefore, Hancock is vested with an interest or estate in these lands sufficient to create a link or nexus between such lands and the "evidences of ownership" of the intangible property (i.e., the notes) secured thereby, and that by virtue of this circumstance a business situs exists in Mississippi. It takes the position that no other criteria for establishing such business situs need be considered.

This position is untenable. It has long been the rule in this state that the mortgagee has no interest or estate in the land mortgaged except as an incident to the chose in action secured by it. In the case of *Buckley, et al. v. Daley, et al.*, 45 Miss. 338 (1871), the Court said:

> "By the adoption of principles long established in chancery, it has become well settled in courts of common law, *that the*

> *mortgagee, until foreclosure, has only a chattel interest; that a mortgage is only a charge upon the land*, and that whatever would give the money will carry the estate in the land along with it to every purpose. *The estate in the land is the same thing as the money due upon it*. It will be liable to debts; it will go to executors; the assignment of the debt will draw the land after it. *From these properties of the mortgagee's estate, it appears in the strongest manner, that it is not in the land, but in the security only*. It has been said and repeated, that it was an affront to common sense to say that a mortgagee in possession was the real owner; that *the mortgagee, notwithstanding the form, has but a chattel, and the mortgage only a security*. Until foreclosure, whether the mortgagee has possession or not, *the estate mortgaged is a pledge only*. The relation of debtor and creditor exists, and the equity of redemption is unimpaired . . ." (Emphasis supplied).

This principle again is set out in *Adams v. Colonial & United States Mortgage Co.*, 82 Miss. 263, 34 So. 482, 529 (1903), in the following language:

> ". . .(*I*)*t has been too long settled in this state to admit of further debate that a mortgagee has no interest or estate in the land mortgaged* . . . In Buckley v. Daley, Supra, the court says: 'The estate in the land is the same thing as the money due upon it. Under our decisions the extent of the mortgagee's right is to sell the property for the purpose of realizing

his debt — *A mere right to resort to the security for the payment of the debt. He has no title which is vendible under execution . . .'* It is expressly said that *'his estate is neither legal nor equitable,' and that he has no 'interest in the property, or right to it, except as an incident to the chose in action secured by it' . . .*" (Emphasis supplied.)

The latest pronouncement of this rule is set out in the case of *Baker v. Connecticut General Life Ins. Co., et al.*, 196 Miss. 701, 18 So.2d 438, 440 (1944), wherein the Court said:

> "The beneficiary in a deed of trust the character of the one here in question is not vested with the title to the land described therein. He has no estate in the land, and cannot convey it to another; he has an interest in it only to the extent that he can cause the trustee in the deed of trust to sell the land and apply its proceeds to the payment of the secured debt . . ." (Citing, among other authorities, Buckley v. Daley, and Adams v. Colonial & United States Mortgage Co., Supra.)

In commenting on this principle, the Court in *Adams*, Supra, by way of *obiter dictum*, discussed the undoubted power of the legislature to enact laws giving real property mortgages a "business situs" in this state by legislatively declaring the interest of a mortgagee to be an estate in land for the purpose of taxation, even though the mortgagee be a nonresident, thereby subjecting such mortgagee interests to taxation. (34 So. at pp. 530, 531, q.v.) However, our legislature has not deemed the exercise of such power to be proper insofar as the statute here under consideration is concerned.

III

A business situs may exist separate and apart from a business domicil. But in order for such a situs to be established, the undertaking engaged in must be more than merely an incidental or superficial activity. In its definition of the term "business situs," Ballentine's Law Dictionary, 2ndEd. (1948), at p. 179, citing 51 Am. Jur., 479, 480, states the following:

> "Some decisions hold that there may be a business situs of debts as distinct from the domicil of the creditor. Thus, where an agent within the state, representing a nonresident principal, is clothed with power and authority to and does create credits or loan money for his principal within the state, the agent holding an actual and effective control over the business, retaining in his own possession within the state the evidences of such debts, or procuring their return to him when due for collection and return or investment, the course of business being general and amounting more or less to a permanent business, then the state may by legislation separate the situs of such property for taxation from the domicil of the owner, and give it a situs within the state for purposes of taxation."

The question of whether or not intangible personalty owned by a nonresident has a situs in this state is to be resolved by determining whether or not the ownership of such intangible arose or exists as an incident to a business conducted in this state. Moreover, an important factor to be considered is the intent of the owner of the intangible property involved, which intent is to be discovered by all surrounding circumstances. See *M. A. Jahier v. H. E. Rascoe*, 62 Miss.699 (1885).

In the case of *State v. Smith, et al.*, 68 Miss.79, 8 So.294 (1890), the Board of Supervisors of Madison County, Mississippi, sought to levy a tax on "money loaned at interest in this state" under Sec.497, Code of 1880, against a non-resident. The lower Court set aside the action of the Board. On appeal the Court affirmed the Court below and in so doing said:

> ". . . There can be no doubt that where an agency is created in this state for the loaning of money, and the business of loaning is carried on here, this state being the locality in which the transaction is begun and completed, and the debt acquires a *situs* here from the course of dealing between lender and borrower, through the agency established here, it is taxable; but where the non-resident lender has no place of business or location or agent in this state, and accomplishes the loan beyond the limits of this state, the fact that negotiations for the loan were made by persons in this state, and it was secured by mortgage on property within this state, does not subject it to taxation here . . . *In the case before*

> *us the creditor resides beyond the limits of this state; has no agent in this state, and no place of business here. The money was not sent here to be loaned. The evidence of debt was not here. The business of lending was not conducted in this state. The debt was secured by a mortgage on property in this state, and the loan was obtained by the application of persons in this state, transmitted to persons beyond its limits, who forwarded the money from without the state. It was not embraced by Section 497 of the Code.*" (Emphasis supplied)

In the case of *Adams v. Colonial & United States Mortgage Co.*, Supra, the Court had before it two questions: (1) whether the interest of a mortgagee is such an interest in the land itself, covered by the mortgage, as to render it liable to taxation (which proposition has been discussed elsewhere in this opinion), and (2) whether notes and mortgages, secured by land in this state, held by a nonresident as "solvent credits", have a business situs in this state making them subject to taxation. The latter question involved the same statute upon which *State v. Smith*, Supra, was based. The Court quoted at length from the *Smith* Case and then remarked (34 So. at p.529):

> ". . . State v. Smith, Supra, is conclusive of this . . . case. *It has been too long recognized as the law, and business investments have been too long made upon the faith of it, to permit it to be questioned. The remedy is with the Legislature, not with the courts* . . . as to its interpretation of Section 497, Code 1880, it seems to us sound. Whether one is an agent

depends, not on paper recitals, but on the facts." (Emphasis supplied.)

The Court was again faced with the question of the taxation of solvent credits arising from an alleged "business situs" in the case of *City of Vicksburg v. Armour Packing Co.*, 24 So.224 (Miss.1898). In that case the appellee, a Missouri corporation, had a place of business and a manager in Vicksburg, Mississippi, to whom it shipped meats to be sold for cash or on 30-day notes or accounts. As the money derived from sales was collected, it was sent to appellee in Kansas City. None of it was invested in Mississippi. At the time of the assessment by the City there were notes and accounts due in the sum of $2,500.00. The lower Court held that the said credits were not taxable. In affirming, our Court said:

". . . The general rule as to the situs of invisible and intangible personal property — as notes, bonds, etc., — is that it follows the domicile of the owner, and it is held to be taxable at such domicile. But it is an exception to the general rule that, where such credits acquire a business situs different from that of the domicile of the owner, then they may be taxed at such business situs. The question as to what constitutes a business situs is, to us, a difficult one; but, as we gather the meaning of the cases on the subject in our Reports, *we take a business situs to be connected with the idea of more or less of permanency of location of such credits, or with a purpose to incorporate them when collected into the mass of property of the state. Upon the facts of this case, there is not,*

as we think, enough of the quality of permanency of location of the credits of appellee to give them a business situs at Vicksburg, so as to render them taxable in this state . . ." (Emphasis supplied.)

In this connection, see also *Gully v. C.I.T. Corporation*, 168 Miss. 268, 150 So. 367 (1933).

The above cases follow the general rule regarding the determination of whether or not a business situs exists, as set out in 51 Am. Jur., Taxation, Section 473, pp. 483,484 (1944);

". . . The extent of the authority of the local agent appears to be, together with the conduct of a continuous or permanent business, the most important factor in determining whether the credits of the nonresident have acquired a business situs in the state for the purpose of taxation . . . where the local agent's authority is limited to mere clerical or ministerial functions without any amount of discretion, the agency is insufficient in any event to give the credits a business situs in the state of the agent's resident . . . *The exercise of independent judgment and discretion by the agent in the conduct of the principal's affairs, and his power to invest and reinvest, or loan and reloan, the proceeds of the credits, appear to be necessary features for the creation of a taxable business at the place of his residence.*" (Emphasis supplied.)

The Commission depends heavily on the case of *Suttles v. Northwestern Mutual Life Insurance Company*, 193 Ga.495, 19 S.E.2d 396 (1942). That case, however, is readily distinguishable from the case at bar. Northwestern Mutual employed one Durant as its loan agent in the State of Georgia. Although loans were approved only by Northwestern Mutual at its home office in Milwaukee, Wisconsin, nevertheless Durant actively solicited the loans, and most of the loans placed by the company in Georgia were made on his solicitation. He maintained an office in Atlanta, the rent for which was paid by the company; he was at all times paid a salary, and received no other compensation; the company paid for his telephone, stenographic, and other clerical expenses; applications were submitted directly to him; with each application, he submitted a personal report or recommendation, stating his opinion as to the moral risk and the value of the security; practically all communications between the company and an applicant passed through him; the company required abstracts of title to the realty covered by the mortgages, and the applicant paid the attorney furnishing the abstract, but the company reserved the right to pass on the attorney's qualifications, and the abstracts were submitted through Durant; approval of the abstracts passed through his office; all notes and deeds were mailed to him for execution, and upon execution he mailed them to the home office; the checks to be delivered to the borrowers passed through him; policies of insurance were obtained by applicants and were accepted by him without previous submission to the company; in final instructions, if there were "some little things" that had to be cleared, the closing attorney took care of them and submitted a "clearance" certificate directly

to Durant, who passed on the certificate and delivered the loan check without submitting the certificate to the home office; when borrowers were required to assign leases on buildings, communications as to such leases also passed through Durant's office; he took over the management of a building on which the company had a loan that was in default, and he managed this building "just like the owners manage other buildings in Atlanta." In short, except for approving the loans, issuing the checks, and keeping the mortgage papers, Durant was for all intents and purposes Northwestern Mutual's alter ego in the State of Georgia.

In holding that a taxable situs existed in Fulton County, Georgia, as to the credits arising from these loans, the Georgia Supreme Court said (19 S.E.2d, at pp.404,405):

> "In numerous decisions by the United States Supreme Court it has been held that choses in action will acquire a situs for taxation in a State other than the State in which the owner is domiciled, if they become integral parts of some local business conducted by him or his agent. Compare Metropolitan Life Insurance Co. v. New Orleans, 205 U.S. 395, 27 S. Ct. 499, 51 L.Ed. 853; Buck v. Beach, 206 U.S. 392, 27 S.Ct. 712, 51 L.Ed. 1106, 11 Ann.Cas.732; Wheeling Steel Corporation v. Fox, 298 U.S. 193, 56 S.Ct. 773, 80 L.Ed. 1143 . . .
>
> * * *
>
> ". . . It is contended on the one side that even though Durant may have been a mere special agent with no authority whatever to make a

loan or transact other business for the company except as expressly directed, yet the company did actually negotiate and finally consumate each loan through him as its agent, and that in such case it is immaterial where the decisions were made, since they were ultimately put into effect in Fulton County only through Durant, as resident agent, and thus constituted business transactions by the company . . .

* * *

"While the checks themselves were not money, they were choses in action and were the equivalent of money to the borrower; also to the lender. The case would not be different if the company had in each instance sent a bag of money to be delivered by Durant to the borrower . . . Again, since Durant was the agent and instrumentality through which each particular loan was closed, it would seem to be immaterial, that he acted in each case on particular instructions, instead of having authority granted in bulk, to do the things that he ultimately did in the company's behalf . . . What he finally did was the company's act, and the net result is that it made loans in Georgia through him . . ."

Neither Mr. Kirk, Hancock's field man, nor Bridges Loan and Investment Company, Inc., Hancock's correspondent, had any such authority in the case at bar. The facts on which the Northwestern Mutual case were decided were totally different from the facts in the case *sub judice*.

Finally, the Commission contends that since Hancock has insurance agents within this state, and its lending activities are a part of its overall scheme of operations and are not conducted by a separate entity, the presence of its agencies for engaging in the life insurance, health and accident insurance and variable annuity business in the State of Mississippi gives its lending activities a business situs within the state. Parenthetically, it is indeed interesting and somewhat strange that this concept of Hancock's activities was not a basis for a claim by the Commission of "business situs" long before the year 1972. But, be that as it may, the Commission's position in this regard is not sound. In the case depended on most strongly by the Commission, this contention is refuted. In *Suttles v. Northwestern Mutual Life Insurance Company*, Supra, the Court was confronted with the identical question. The language employed by that Court is, in the opinion of this Court, very well-reasoned and based on a sound premise. In resolving this issue it said (19 S.E.2d, at p. 400):

". . . (T)he evidence showed without dispute that the loans were made through an entirely different channel from that through which the company issued its insurance contracts, and were placed here merely as a part of its general investment policy, with no particular reference to the life-insurance business done by it in Georgia. While it does appear that these investments were made for the purpose of producing income and thereby enabling the company to perform its insurance contracts generally, and in this sense they may have constituted an incident of its Georgia in-

surance business, yet, so far as shown, the connection was not different from that which existed between such investments and the whole mass of its insurance business, wherever placed; and this alone would not establish a tax situs, so as to render the credits taxable in this State. The loans were not made to policyholders as such, and the fact that an applicant for a loan may have been a policyholder did not, according to the evidence, have any bearing on the trans action ... Under the facts appearing, the credits arising from the loans were not taxable in Georgia merely upon the theory that they were a part of an insurance business conducted by the lender in this State."

This Court finds that under the facts and the law in the case at bar, the evidence of ownership of intangible property held by Hancock arising from real property mortgage loans within this state have not acquired either a business situs, commercial situs or actual situs in Mississippi and, as a consequence, the interest income received by Hancock therefrom is not subject to income taxes in this state.

IV

Aside from what has been said above, a most important facet of this case involves the question of whether or not certain long-continued regulations of the Commission, coupled with its policy and procedure regarding evidences of the ownership of intangibles held outside this state, have acquired the force and effect of law. In order to explore this proposition, and arrive at a conclusion, it is necessary to review the in-

come tax laws and the regulations of the Commission promulgated as a result thereof:

This state's first income tax law was enacted in 1912. It was rewritten in 1924. Section 15(1)(a), Ch.132, Laws of 1924, states in part as follows:

> "Sec. 15. (1) *That in the case of foreign corporations* or of a non-resident or citizen of a foreign country *the following items of gross income shall be treated as income from sources within the state.*
>
> "(a) Insurance premiums, *interest on bonds, notes, or other interest bearing obligations of residents, corporate or otherwise;* the amount received as dividends from domestic corporations (other than national banks and trust companies organized under the laws of the State of Mississippi), *provided, income from money loaned by non-residents or foreign corporations or citizens of a foreign country, shall not be included as taxable income* . . ." (Emphasis added.)

The income tax law was again rewritten in 1934. That portion of the 1924 Income Tax Act relative to the income of nonresidents, foreign corporations, and citizens of foreign countries, as set out above, underwent but minor change in the reenactment. Section 11(1)(a), Ch.120, Laws of 1934, states in part the following:

> "Sec.11. (1) *In the case of foreign corporations* or of a non-resident or citizen of a

foreign country *the following items of gross income shall be treated as income from sources within the state.*

"(a) Insurance premiums, interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise; the amount received as dividends from domestic corporations, *provided, income from any loan by non-residents or foreign corporations or citizens of a foreign country, shall not be included as taxable income . . ."* (Emphasis added.)

Section 11, Ch.120, Laws of 1934, was amended by Section 11, Ch.151, Laws of 1936, but that portion of the statute quoted above remained unchanged.

The Commission's interpretation of this statute, for administrative purposes, is set out in Tax Commission Regulations No. 1 (1924), Art.166, wherein the following language appears:

"Non-residents, foreign corporations, and citizens of foreign countries shall include as gross income from sources within the State all income of every sort derived from business done or property located within the State; *except that interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, need not be included."* (Emphasis added.)

Tax Commission Regulations No. 2 (1928), No. 3 (1932), No. 4 (1934), and No. 5 (1937), contained the same language in this regard.

In the case of *Mississippi Cottonseed Products Co. v. Stone, et al.*, 184 Miss. 409, 184So.428 (1938), cert den 306 U.S. 656, 59 S.Ct. 774, 83 L.Ed. 1054 (1939), the Court had before it the question of construing, for the purpose of ascertaining its true meaning, the following portion of the above mentioned statute: ". . . (P)rovided, income from any loan *by* non-residents or foreign corporations or citizens of a foreign country, shall not be included as taxable income . . ." It held that ". . . In construing a statute a court may ascertain its true meaning by studying it as a whole; and when ascertained, may enforce it, even to the extent of correcting errors in the language used . . ." (See 184 So. at p. 431). Upon consideration of the statute in its entirety, the Court concluded that the word "to" should be substituted for the word "by" in the above quoted proviso, so that thereafter its reading would be ". . . (P)rovided, income from any loan *to* non-residents or foreign corporations or citizens of a foreign country, shall not be included as taxable income . . ."

Thus, an entirely different meaning was placed on this portion of the statute, since both the object of any such loan and the recipient of interest income therefrom became completely changed.

As the result of *Mississippi Cottonseed Products*, the Commission altered its regulation by simply deleting therefrom the following language:

". . . (E)xcept that interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, need not be included."

In the next issue of its Regulations (i.e., No. 6,1939), Article 245 thereof states as follows:

"Non-residents, foreign corporations, and citizens of foreign countries shall include as gross income from sources within the State all income of every sort *derived from business done or property located within the State*. (Emphasis supplied.)

"This Article of Regulations No. 5 provided that interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise, need not be included in the gross income. On November 7, 1938, the Mississippi Supreme Court handed down a decision, styled Mississippi Cottonseed Products Company vs. A. H. Stone, et al. The effect of that decision was to change the word 'by' to 'to' in Section 11(a), Chapter 120, Laws of 1934, and Chapter 151, Laws of 1936. That provision of the Law will now be read:

" 'Insurance premiums, interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise; the amount received as dividends from domestic corporations, provided, income from any loan to non-residents or foreign corporations, or

citizens of a foreign country, shall not be included as taxable income' . . ."

This regulation in regard to the treatment of the income of nonresidents, foreign corporations and citizens of foreign countries was carried forward in Regulations No. 7 (1942), No. 8 (1946), and No. 9 (1948).

In short, it is readily seen and unmistakably ascertainable from the actions of the Commission, and from the evidence received in the trial of the case at bar, that the Commission recognized the applicability of the maxim *mobilia sequuntur personam*. Prior to the decision in *Mississippi Cottonseed Products*, the Commission by its regulations took the unequivocal position that interest on bonds, notes, etc. held by foreign corporations, nonresidents and citizens of foreign countries, derived from obligations of citizens of this state, was not considered as gross income for income tax purposes. After the decision in that case, the Commission modified its interpretation of the statute by taking the position that such income must be included *if it was derived from business done or property located within the state*. This, of course, meant that income from intangible property held by nonresidents, foreign corporations and citizens of foreign countries was not to be included in gross income unless there existed a nexus, or link, sufficient to give the evidence of ownership of such property a "business situs" within this state. This position taken by the Commission is consistent with *Jahier v. Rascoe*, *City of Vicksburg v. Armour Packing Co.*, and *Gulley v. C.I.T. Corporation*, cited herein above.

The evidence shows that in the year 1950 Henry N. Eason, Chief of the Division of Income Tax, and other department heads of the Commission, including the Commission's general counsel, appeared before a tax study committee of the legislature for the purpose of outlining certain recommendations for changes in the tax laws. Among the numerous recommendations submitted were the following: (1) That the income tax law be rewritten, and (2) that an amendment be made in regard to the definition of "gross income received by a nonresident," since the Income Tax Division had consistently taken the position that the income from intangible property held by a nonresident could not be taxed "unless certain conditions obtain."

Under date of October 4, 1950, Mr. Eason submitted a report to the Chairman of the Commission setting out in detail the recommendations made to the legislature. The position of the Income Tax Division relative to income derived by non-residents from intangible property was stated in that report as follows:

> "(This Section) relates to non-residents or foreign taxpayers. Subsection 1(a) recites the items of gross income which shall be treated as gross income within the State. I quote a part of that Subsection:
>
> 'Insurance premiums, interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise; the amount received as dividends from domestic corporations, provided, income from any loan to nonresidents or foreign corporations, or

> citizens of a foreign country, shall not be included as taxable income, or from foreign corporations of which more than fifty per cent of the gross income was derived from sources within the State.' *This language should be stricken from the statute for the reason that we cannot tax the intangible income of a nonresident unless the evidence of ownership has acquired a business situs within Mississippi. There might be substituted therefor, 'Insurance premiums and income from intangibles when the intangible property which produces the income has acquired a business situs within this State.'* . . ." (Emphasis supplied.)

During the next following Regular Legislative Session (1952), the Income Tax Law was rewritten. Section 11, Ch. 402, Laws of 1952, appears in the Mississippi Code of 1942, Recompiled, as Section 9220-12. That statute states, in part, as follows:

> "(1) In the case of foreign corporations or of a nonresident or citizen of a foreign country, the following items of gross income shall be treated as income from sources within this State:
>
> "(a) Interest on bonds, notes or other interest-bearing obligations, and the amount received as dividends *if the evidence of ownership has acquired a business situs in this state* . . ." (Emphasis supplied.)

This statute was amended by Section 3, Ch.554, Laws of 1958, to its present form (Sec.9220-12, as amended, Miss.Code 1942, Recompiled, carried forward as Sec.27-7-23, Miss. Code 1972). The portion with which this case is concerned now reads:

> "(1) In the case of foreign corporations or of individuals, partnerships, trusts or estates, not residents of the State of Mississippi, the following items of gross income shall be treated as income from sources within the state.
>
> "(a) Income from intangible property of any kind or nature, *if the evidence of ownership has acquired a business, commercial or actual situs in this State* . . ." (Emphasis supplied.)

After the tax laws were rewritten in 1952, the Regulations issued by the Commission continued to recite that income from intangible property held by foreign corporations and nonresidents was to be treated as having its source in this state if, and only if, it was derived from services rendered, business done, or property located within the state. In other words, the question for determination in each case was whether or not the evidence of ownership of such an intangible had acquired a business situs in Mississippi.

The question, of course, is simply this: What criteria were employed by the Commission in determining the existence of a business situs? From the evidence adduced at the trial, it is apparent that the yardstick used by the Commission took into its purview (1) whether

or not such an intangible is employed as capital in the state, (2) whether or not it has been localized in connection with a business of the foreign corporation or nonresident, or (3) whether or not it has become an asset of the business in this state. This interpretation by the Commission becomes obvious, for example, in Regulations No. 7, issued before the 1952 Act, and Regulations Nos. 10 and 11, both of which were issued after the 1952 Act, wherein subparagraph (c) under the heading "Income from Intangible Personal Property" is in the following words:

> "Intangible personal property has a business situs in this State if it is employed as capital in this State or the possession and control of the property has been localized in connection with a business, trade or profession in this State so that its substantial use and value attach to and become an asset of the business, trade or profession in this State. For example . . . if a nonresident maintains a branch office here and a bank account on which the agent in charge of the branch office may draw for the payment of expenses in connection with the activities in this State, the bank account has a business situs here."

This interpretation of the statute regarding intangible property held by nonresidents and foreign corporations was, according to the evidence, the same position that had been held by the Commission since the enactment of the Income Tax Act of 1924. In 1953, an inquiry was made of the Commission by Connecticut General Life Insurance Company, of Hartford, Connecticut, concerning whether or not any change in

regard to income from intangibles had been wrought by the 1952 Act. In a letter to Connecticut General dated March 12, 1953, the Chief of the Income Tax Division advised as follows:

> "I wish to advise you that, insofar as the reporting of intangible income is concerned, there is no change in the 1952 Act as related to prior statutes. Our purpose with regard to your intangible income is the same now as it has been since 1924."

Parenthetically, it should be noted here that Connecticut General's inquiry was made on its behalf by a representative of its Farm Loan Office at Greenville, Mississippi, who obviously held a position comparable to that of Hancock's farm loan field man in the case at bar.

In the year 1952, Commonwealth Life Insurance Company, a foreign corporation with offices in Louisville, Kentucky, filed a claim for overpayment of income taxes with the Commission. This claim was based on erroneous payment on income derived from interest on loans made by the taxpayer to Mississippi residents for the years 1949, 1950, and 1951. On January 5, 1953, a Certificate of Overpayment of Taxes, executed by A. H. Stone, Chairman of the Commission, was sent to the Auditor of Public Accounts stating that Commonwealth was entitled to a refund of $7,090.33. As a part of the Commission's stated reason for allowance of this refund, the certificate contained this language:

> "... Since the net investment income reported for each of these years exceeds the net income reported, the total tax paid for each of these three years should be refunded. The total of the taxes listed above is $7,090.33. It is well established that a nonresident may not be taxed on intangible income unless the assets which produce the income acquire a business situs in Mississippi ..."

The Commission thus found that the evidences of Commonwealth's intangible property (promissory notes) had not acquired a business situs in Mississippi, although it had a correspondent in this state. Parenthetically, it must be observed that the relationship between Commonwealth and its correspondent was comparable to the relationship existing between Hancock and its correspondent in Mississippi, Bridges Loan and Investment Company, Inc., in the case at bar.

Again, the Commission's position on the definition of "business situs" is set out in a letter from Henry A. Fly, of the Income Tax Division, to United Benefit Life Insurance Company, of Omaha, Nebraska, under date of October 3, 1957, in the following language:

> "Your income from policy loans is derived from promissory notes executed by the policy holders. These notes, being intangible property, have a situs at your domicile unless they have acquired a business situs elsewhere. To give your notes from Mississippi policy holders a business situs in this state I believe that they would have to be accepted in Missis-

> sippi, be physically located here, the payments thereon be received and accepted here and, generally, all matters pertaining to the making, collection and handling of such notes be under the full authority of a Mississippi office as if your investment department had been decentralized to that extent."

(The subject of this excerpt concerned interest income from policy loans, as opposed to loans secured by real property in Mississippi. However, it is indicative of the Commission's position on the subject of "business situs".)

H. I. Adcock was called as an adverse witness by Hancock. Mr. Adcock is the Assistant to the Commission Chairman. He has been employed by the Commission since January 25, 1937. He said that the 1958 Act, which added the words "commercial or actual situs" to the words "business situs" brought about no change in the Commission's policy toward intangible property held by nonresidents. He confirmed the Commission's interpretation of the tax law as it pertains to nonresidents holding evidences of ownership of intangibles. He testified that there was no doubt about this position until a contrary posture was taken by the Commission in 1972. He identified the "Foreword" to the 1971 Regulations, which document contains the following language:

> ". . . When a change is necessary, it will be effective from the date of revision, just as in the case of new legislation or a decision of the

> Supreme Court of this State, *and will not be enforced with retroactive effect . . .*" (Emphasis supplied.)

Mr. Adcock said this language had been in the foreword of every issue of the Tax Regulations since 1937.

Henry N. Eason was called as an adverse witness by Hancock. Mr. Eason was employed by the Commission on January 1, 1925. His employment ended with his retirement on December 1, 1965. He was Assistant Chief of the Income Tax Division until June 1, 1932, at which time he assumed the duties of Chief of that Division, a position he held until his retirement. He testified that the Commission's policy was that when the evidence of ownership of intangible property was held outside the State of Mississippi, it was not taxable. He said that neither the 1952 Act nor the 1958 Act changed this policy, and that to his knowledge the Commission maintained its position in this regard until his retirement in 1965.

Henry A. Fly, a member of the Mississippi Bar, was employed by the Commission from 1947 to 1961. Most of his duties were in the field of income and franchise taxes. For approximately the last five years of his employment he worked with insurance company returns. He said that the position was taken by the Commission that under the procedure used by insurance companies in making loans in Mississippi, the evidences of ownership (i.e., the promissary notes) of intangible property held outside Mississippi did not acquire a situs in this state, and that the interest deriv-

ed therefrom was not taxable. He testified that this policy was in effect during the entire time he was employed by the Commission, and was never changed by either legislative act or regulation of the Commission.

A brief summary of the testimony and documentary evidence shows the following:

(1) The policy and position of the Commission early was aligned with the decisions of the Supreme Court of this state on the definition of "business situs" and the application of the maxim *mobilia sequuntur personam*. From the year 1924 forward, and until some fourteen years after the legislature reenacted the statute in 1958, it was the position of the Commission that if foreign corporations or nonresidents held evidences of ownership of intangible property, such as the notes here in question, arising from indebtednesses or obligations of citizens of this state, the interest thereon could not be subjected to taxation as income unless (a) the evidence of indebtedness was kept in this state, in which case it would have an actual situs, or (b) such interest income was employed as capital in this state, or (c) such interest income was localized in this state with the business of such nonresident or foreign corporation, or (d) such interest income had become an asset of the business of such nonresident or foreign corporation in this state. Through communications with the Commission, and in accord with the Commission's established procedure, which was well known to foreign corporations and nonresidents holding such evidences of ownership without the State of Mississippi, such policy,

procedure and position were accepted and relied upon by foreign insurance corporations.

(2) During the period of time aforesaid, the statute here in question was reenacted four times, viz.: (a) by Section 11, Ch.120, Laws of 1934; (b) by Section 11, Ch.151, Laws of 1936; (c) by Section 11, Ch.402, Laws of 1952; and (d) by Section 3, Ch.554, Laws of 1958. In none of these reenactments did the legislature employ language indicative of a disapproval of the Commission's policy and procedure in regard to its treatment of intangible property held by foreign corporations and nonresidents, although the legislature knew or was presumed to know of this policy and procedure; nor did the legislature give a definition of the term "business situs" inconsistent with the judicial interpretation accorded that term by our Supreme Court.

The general rule in this regard is set out in 73 C.J.S., Public Administrative Bodies and Procedure, Sec. 108, pp. 430, 431 (1951), as follows:

> "... (A) regulation of an administrative agency construing a legislative enactment may be deemed to have received legislative approval and to have the effect of law where it is long-continued without substantial change and it applies to unamended or substantially reenacted statutes ..."

The decision in *Barr v. Delta and Pine Land Company*, 199 So.2d 269 (Miss.1967), is based squarely on this principle.

In that case, from 1938 until 1958 the statute levied a percentage on the gross income of cotton gins. In 1958 the statute was amended to provide a tax of 15 Cents per bale ginned. In 1962, the legislature enacted a provision for an increase in the tax to 30 Cents per bale ginned. Then, by act of the legislature in 1964, the tax reverted to 15 Cents per bale. Except for the amount of the tax, the wording of the 1958, 1962, and 1964 statutes remained the same. In the Court's words, "... the statute as passed in the legislature in 1958, 1962 and 1964, has, for purposes of this case, remained unchanged since 1958." (199 So.2d at p. 270.)

State Tax Commission Rule 37, adopted in 1950, stated that no tax would be due from the ginner when ginning his personally owned crop. This was the Commission's interpretation of Section 10111, Code 1942, based on the reasoning that in such case no gross income from the ginning operation would be derived.

Then, contrary to the rule which had been in effect since 1950, the Commission on July 1, 1964, adopted a rule subjecting ginners to a tax of 15 Cents per bale on cotton ginned without regard to the ownership of the seed cotton. In other words, under the 1964 rule the ginner would be liable for the tax even though he personally owned the crop ginned.

The Commission contended that the 1950 rule was a correct interpretation of Section 10111, 1942 Code, as originally enacted (i.e., imposing a tax on the gross income of cotton gins), but that subsequent legislative amendments, i.e., in 1958, 1962, and 1964 (imposing a fixed rate per bale ginned) necessitated a change in the rules.

On March 2, 1964, the Court in the case of *Barr v. Owen*, 161 So.2d 206 (Miss.1964) affirmed without opinion (before the change in the Commission rule on July 1, 1964) a trial court holding that no tax was due on cotton ginned by partnership-plantation-type gins, for the reason that there was no gross income therefrom. After the decision in the Owen Case, the legislature enacted the 1964 amendment, with knowledge of the Commission's long-standing rule, which had been in effect since 1950, and the Court's approval thereof.

In affirming the lower Court's ruling, the Court in the *Delta and Pine Land Company* Case said (199 So.2d 271, 272):

"The question to be determined is whether appellee is subject to the tax levied on cotton gins under Section 10111, as this statute is construed by State Tax Commission Rule 37(h) as promulgated on July 1, 1964.

"'The effect of subsequent acts of a legislature after administrative interpretation of a statute is set out in 2 Am. Jur.2d, Administrative Law, Section 253 (1962):

" 'The re-enactment of a statute after it has been construed by the agency charged with its enforcements, without materially altering the part construed, or without change indicative of a disapproval of a prior established construction, impliedly adopts the construction, especially where there are repeated re-enactments, as in the

case of the former federal revenue acts, where the administrative construction has also had judicial approval, or where there is evidence that the legislature considered the administrative history of the statute or was advised of the construction.'

"*When the legislature re-enacts a statute, it is presumed to know and adopt the construction placed thereon by the State Tax Commission.* Gully v. Jackson International Co., 165 Miss. 103, 145 So. 905 (1933); White v. Miller, 160 Miss. 734, 133 So. 146 (1931). (Emphasis supplied.)

• • •

"The construction of a statute by those administering it is usually binding on them or their successors, as the public relies on such construction. This does not mean that the administrative body is powerless to change the construction by a new rule under a changed situation or varied circumstances. However, either legislative re-enactment or court decision approving the rule of construction supersedes the administrative construction and places it beyond the power of the administrative body to repeal by subsequent rule change so long as the statute remains substantially unchanged . . ."

In the case at bar, there have been no "changed situations or varied circumstances" that would justify

the alteration of the Commission's policy and position regarding the determination of a "business situs". The Commission's interpretation of that term, and the criteria applied thereto, were the same from 1924 until the imposition of the tax on Hancock, retroactively, in 1972. In the opinion of this Court the Mississippi Legislature adopted the Commission's long-utilized standards for determining "business situs" by its repeated reenactments of the statute in question.

Any change in the method of determining whether or not the evidence of ownership of intangible property, held by a foreign insurance company as a result of mortgage lending in this state, has acquired a "business, commercial or actual situs" in Mississippi is a matter for the legislature. In its concluding paragraph in the *Delta and Pine Land* Case, the Court said that if, in fact, it had failed to carry out the intent of the legislature, it is the prerogative of the legislature to remedy the situation by clear direction. In the case at bar, this Court takes the same position.

In view of the findings and the decision of the Court herein, it is not necessary to entertain and render an opinion on the points submitted for consideration by Hancock relative to the constitutionality of the assessment of the tax here in question.

The Commission is reversed and judgment is rendered here for John Hancock Mutual Life Insurance Company. The order of the Mississippi Tax Commission rendered on May 15, 1973, fixing an assessment of income tax and interest in the amount of $228,481.19 against John Hancock Mutual Life In-

surance Company, on interest income received by it in the taxable years 1969, 1970, and 1971, from loans secured in whole or in part by real property situated in the State of Mississippi, is vacated, set aside and held for naught. The cross-bill of the Mississippi Tax Commission is dismissed, and all costs herein are assessed against the Commission.

A decree will be drawn and submitted to the Court in accord herewith.

/s/ GEO. Wm. HAYNES
CHANCELLOR

APPENDIX "C"

In the Chancery Court of the
First Judicial District of Hinds County, Mississippi
No. 89,680

John Hancock Mutual
Life Insurance Company
Petitioner

versus

Charles R. Brady, Chairman, and
Mississippi State Tax Commission
Respondents

FINAL DECREE

Filed: Apr. 4, 1975

This cause coming on to be heard on petition, answer, cross-bill, answer to cross-bill, and other motions and pleadings, and oral and documentary evidence; and having heard all of same together with the oral and written arguments of counsel, and being now fully advised in the premises, the Court issued its opinion in writing making findings of fact and conclusions of law, which opinion has been filed with the Clerk of this Court and the same is incorporated herein by reference. The Court is of the opinion and so finds that the Petitioner, John Hancock Mutual Life Insurance Company, is entitled to the relief prayed for in its Petition herein; and

The Court further finds that the bond filed herein by the Petitioner in the amount of $456,962.38 pursuant to statute is no longer required.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order of the Mississippi State Tax Commission rendered on May 15, 1973, making an assessment of income tax and interest in the amount of $228,481.19 against John Hancock Mutual Life Insurance Company, Petitioner herein, on interest income received by it in the taxable years 1969, 1970 and 1971, from loans secured in whole or in part by real property situated in the State of Mississippi, is vacated, set aside and held for naught;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid bond filed by the Petitioner herein in the amount of $456,962.38 be and it is hereby voided;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cross-bill of the Mississippi State Tax Commission is dismissed, and all costs herein are assessed against the Mississippi State Tax Commission.

The Respondent having announced in open court its desire and intention to appeal from this decree and having petitioned in open court for such an appeal, the Petitioner being present in Court at said time, said Petition is granted and appeal allowed.

ORDERED, ADJUDGED AND DECREED, this the 4th day of April, 1975.

/s/ GEO. Wm. HAYNES
CHANCELLOR

APPENDIX "D"

In the Supreme Court of Mississippi

Wednesday, January 12, 1977, Court Sitting : : : :

Charles R. Brady, Chairman,
Mississippi State Tax
Commission

#48,955 vs.

John Hancock Mutual Life
Insurance Company

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Chancery Court rendered in this cause on the 4th day of April, 1975-be and the same is hereby reversed and the Order of the Tax Commission is reinstated. It is further ordered, adjudged and decreed that the appellee do pay all of the costs of this appeal to be taxed for which let proper process issue.

Minute Book "BS", Page 129

ATTEST
A True Copy
This the 6 day of May, 1977
JULIA H. KENDRICK
CLERK
Supreme Court of Mississippi
/s/ JOYCE L. HINKLE

APPENDIX "E"

In the Supreme Court of Mississippi

Wednesday, March 2, 1977, Court Sitting : : : :

Charles R. Brady, Chairman,
State Tax Commission

#48,955 vs.

John Hancock Mutual Life
Insurance Company

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same En Banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

Minute Book "BS", Page 186

ATTEST
A True Copy
This the 6 day of May, 1977
JULIA H. KENDRICK
CLERK
Supreme Court of Mississippi
/s/ JOYCE L. HINKLE

APPENDIX "F"

In the Supreme Court of Mississippi

No. 48,955

John Hancock Mutual Life
Insurance Company, Appellant

versus

Charles R. Brady, Chairman
State Tax Commission, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John Hancock Mutual Life Insurance Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Mississippi, entered January 12, 1977 and denial of petition for rehearing entered March 2, 1977, reversing the decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi and reinstating the order of the State Tax Commission assessing income tax and interest against the Appellant above named.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

L. ARNOLD PYLE
WARREN V. LUDLAM, JR.
DAVID B. GRISHMAN
/s/ WARREN V. LUDLAM, JR.
Counsel for Appellant

Of Counsel:

WATKINS PYLE LUDLAM WINTER & STENNIS
2000 Deposit Guaranty Plaza
Post Office Box 427
Jackson, Mississippi 39205

PROOF OF SERVICE

I, WARREN V. LUDLAM, JR., one of the attorneys for Appellant, John Hancock Mutual Life Insurance Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of May, 1977, I served a copy of the foregoing Notice of Appeal on the parties required to be served by mailing a copy of same by United States mail, First Class, postage prepaid, to Mr. James H. Haddock, one of the attorneys for Appellee, Charles R. Brady, Chairman, State Tax Commission, Post Office Box 960, Jackson, Mississippi, 39205.

/s/ WARREN V. LUDLAM, JR.
WARREN V. LUDLAM, JR.
Attorney for John Hancock Mutual Life Insurance Company

APPENDIX "G"

Section 27-7-23, Mississippi Code of 1972, Annotated (recodification of Section 9220.12, Mississippi Code of 1942)

§ 27-7-23. Net income of nonresident and foreign taxpayers.

(1) In the case of foreign corporations or of individuals, partnerships, trusts or estates, not residents of the State of Mississippi, the following items of gross income shall be treated as income from sources within the state:

(a) Income from intangible property of any kind or nature, if the evidence of ownership has acquired a business, commercial, or actual situs in this state; compensation for personal services or labor performed within this state; rentals or royalties from property or any interest in property within the state, or property moved within and without the state, to the extent that such rentals or royalties represent payment for use within the state; insurance premiums received under contracts covering Mississippi risks and reinsurance premiums received on reinsurance assumed from domestic companies covering Mississippi risks; and income from the operation, or ownership of any property within the state. There shall be reported any and all income from activities or transactions engaged in within this state for the purpose of financial profit or gain, whether or not the taxpayer is qualified to do business in this state, maintains an office or place of business, or the activity or

transaction is in, or connected with, interstate or foreign commerce.

(b) From the items of gross income specified herein there shall be deducted the expenses, losses and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses or other deductions which cannot be definitely allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the state.

(c) In the cases of gross income derived from sources partly within and partly without the state, the net income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the state may be determined by processes or formulas of general apportionment, prescribed by the commissioner, with the approval of the governor.

(d) Insurance companies, other than life insurance companies, deriving premium income from within and without the state, may determine their Mississippi net income from underwriting by apportioning to this state a part of their total net underwriting income by such processes or formulas of general apportionment as are prescribed by the commissioner, with the approval of the governor; provided that a company adopting this method of reporting for any year must adhere to said method of reporting for subsequent

years, unless permission is granted by the commissioner to change to a different method of reporting; and provided that all affiliated companies of the same group shall use the same method of reporting.

(2) Gains, profits, and income from transportation or other services rendered partly within and partly without the state, or from the sale of personal property produced by the taxpayer within and sold without or produced by the taxpayer without and sold within the state, shall be treated as derived partly from sources within and partly from sources without the state, and such gains, profits, and the income shall be determined under such processes or formulas of general apportionment as are prescribed by the commissioner, with the approval of the governor.

(3) Gains, profits and income derived from the purchase of personal property within and its sale without the state, or from the purchase of property without and its sale within the state, shall be treated as derived entirely from the state in which sold.

(4) A foreign corporation or a nonresident or citizen of a foreign country shall secure the benefit of the deductions and credits allowed by this act only by filing or causing to be filed with the commissioner a true and accurate return of his total income, corporate or otherwise, including therein all information which the commissioner may deem necessary for the calculation of such deductions and credit.

(5) In the case of a failure to file a return, the commissioner shall collect the tax on such income; and all

property belonging to such foreign corporation, nonresident or citizen of a foreign country shall be liable for the tax.

(6) Any individual or corporation subject to the tax imposed by this article, engaged in the business of performing contracts which may require the payment of net income taxes, may be required by the commissioner, before entering into the performance of any contract or contracts the consideration of which is more than ten thousand dollars, to execute and file a good and valid bond with a surety company authorized to do business in this state, or with sufficient sureties to be approved by the commissioner, conditioned that all taxes which may accrue to the State of Mississippi will be paid when due. Provided, however, that such bond shall not exceed five per centum of the total contracts entered into during the taxable period, and, provided further, that any taxpayer, in lieu of furnishing such bond, may pay the maximum sum required herein as advance payment of taxes due on the net income realized from any contract or contracts performed or completed in this state.